Submission to the public consultation on the Nursing and Midwifery Board of Australia draft Guidelines for professional indemnity insurance arrangements for nurses and nurse practitioners

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Lee Thomas
Federal Secretary

Yvonne Chaperon
Assistant Federal Secretary

Australian Nursing Federation
PO Box 4239 Kingston ACT 2604
T: 02 6232 6533
F: 02 6232 6610
E: anfcanberra@anf.org.au
http://www.anf.org.au
1. Introduction

The Australian Nursing Federation (ANF) was established in 1924. The ANF is the largest professional and industrial organisation in Australia for nurses and midwives, with Branches in each State and Territory of Australia. The core business of the ANF is the professional and industrial representation of our members and the professions of nursing and midwifery.

The ANF has membership of over 220,500 nurses, midwives and assistants in nursing who are employed in a wide range of enterprises in urban, rural and remote locations in both the public and private health and aged care sectors.

The ANF participates in the development of policy relating to: nursing and midwifery practice, professionalism, regulation, education, training, workforce, and socio-economic welfare; health and aged care, community services, veterans’ affairs, occupational health and safety, industrial relations, social justice, human rights, immigration, foreign affairs and law reform.

The ANF Federal Office, in consultation with the ANF State and Territory Branches and legal advice, has considered the draft Guidelines for PII arrangements for nurses and nurse practitioners. Comments below relate generally to previous consultations on the Nursing and Midwifery Board of Australia’s (NMBA) Professional indemnity insurance (PII) arrangement registration standard and Guidelines for professional indemnity insurance (PII) arrangements for midwives and specifically to the newly developed draft Guidelines for professional indemnity insurance (PII) arrangements for nurses and nurse practitioners.

NMBA Professional indemnity insurance arrangements registration standard and Guidelines for professional indemnity insurance arrangements for midwives

The ANF has voiced concerns to the NMBA during previous consultations in relation to significant issues with both the NMBA PII arrangements registration standard and Guidelines for PII arrangements for midwives. Issues with the current Guidelines for PII arrangements for midwives remain unresolved. The current consultation on the newly developed Guidelines for PII arrangements for nurses and nurse practitioners by the NMBA therefore provides the opportunity to yet again, state the ANF’s on-going unresolved concerns.

In the ANF submission to the NMBA consultation provided in May 2011 on the revised NMBA PII arrangements registration standard, a request was made to delete the proposition in the Standard that:

"Nurses and midwives in a genuine employment or student relationship would be covered vicariously by the employer’s or education institution’s insurance."

As previously stated in our submission, the ANF was of the view that this proposition was misleading and confusing.
We went on to state that embedded in what is a statement of opinion, are a set of assumptions as to the existence of a contract of insurance and such insurance containing an extension of cover clause applying to the employer’s employed nurses and midwives. There is no legal obligation on employers to provide insurance that extends to nurses in respect of their liability. If the NMBA consider that the fact of genuine employment in Australia is of itself adequate to provide “appropriate” PII cover for nurses and midwives it should say so in clear terms. If not, then the proposition should be omitted. In either case, the ANF suggested that the proposition should be deleted.

Subsequently, the NMBA removed this statement from the NMBA PII arrangements registration standard. Disappointingly, however, reference to this issue remains in the Guidelines for PII arrangements for midwives, despite the ANF feedback. The Guidelines for PII arrangements for midwives continues to state in Figure 1 on page 2 that:

“Employer usually provides PII coverage for employees, BUT midwife does need to determine if he or she is covered”

and

“Midwife does not need to purchase insurance if appropriate PII is provided by employer”

It is the ANF’s distinct understanding that employers, in fact, provide vicarious liability cover and not PII as has been asserted in the Guidelines for PII arrangements for midwives. The ANF considers the above statements to be incorrect.

As the newly developed draft Guidelines for PII arrangements for nurses and nurse practitioners are modelled almost entirely on the Guidelines for PII arrangements for midwives, this same issue remains. The NMBA’s representation in these guidelines that nurses and midwives are covered for PII by employer insurance is misleading and will prompt them to rely upon that representation to their detriment. It can be expected that employers will also rely heavily on such representations in advising their nursing and midwifery staff that they meet the NMBA PII Registration Standard through the employers insurance. This advice from employers will further dissuade nurses and midwives from undertaking their own due diligence as required by both the Standard and Guidelines. It is therefore of utmost importance that nurses and midwives understand that they are required to ensure that they do in fact have PII insurance which covers negligent acts and includes run-off cover.

The purpose of the NMBA, and subsequently the Board’s Registration Standards, is to protect the public and to guide the profession. As the PII Registration Standard is in place to ensure public protection, it follows that the guidelines should have the same objective. The NMBA has a duty to provide professionally accurate advice and information to nurses and midwives that they may rely upon. Each Board member of the NMBA shares this common law duty for the provision of this advice. Provision of misleading advice which prompts nurses and midwives to infer that their employer’s insurance provides indemnity for negligent acts, when in fact this is not the case, may result in harm to those receiving care. Should this occur, the NMBA will have failed to meet its statutory obligation under the National Law to protect the public.
Draft Guidelines professional indemnity insurance for nurses and nurse practitioners

The premise of the draft guidelines is to provide direction and further detail about the requirements for PII arrangements in the Registration Standard however this seems to be an unwieldy tool that does not necessarily provide the clarity required. It appears to be an almost exact replication of the Guidelines for PII arrangements for midwives. These guidelines make no reference to being applicable to enrolled nurses, who also require PII to practice. What is the NMBA’s intention for the provision of guidance to enrolled nurses on the issue of PII arrangements?

Specific comments:

Scope of Insurance required (Pages 4 and 5)

In order to understand what constitutes appropriate PII arrangements for each registered nurse or nurse practitioner, the National Board provides the following information that registered nurses and nurse practitioners are required to consider:

- the practice setting and type of services and care provided
- the client group
- the volume of clients to whom treatment, advice, guidance or care is provided by the registered nurse or nurse practitioner
- the health status of the registered nurse or nurse practitioner’s client group
- previous history of insurance claims and the type of claim made against the registered nurse or nurse practitioner on the past, if any
- the professional experience of the registered nurse or nurse practitioner
- advice from the indemnity insurers, professional associations and industrial organisations, including advice regarding the history and volume of professional liability claims experience by other members of the profession, provided by a relevant professional organisation
- advice of an insurance broker
- the registered nurse or nurse practitioner’s current employment status
  - an employee working exclusively in public or private health services, or in private medical practices
  - working as a sole practitioner (either full time or part time basis) working in businesses owned by the registered nurse or nurse practitioner or in a partnership or collective; or where a registered nurse or nurse practitioner is employed (full-time or part-time) by a company that is owned solely by the registered nurses or nurse practitioners where the only directors of that company are registered nurses or nurse practitioners
  - working for part of the time as an employee and for another part of their time as a registered nurse or nurse practitioner in private practice
  - providing nursing or nurse practitioner services in a voluntary, subsidised or otherwise unpaid capacity
This section does not provide for more clarity as there is no guidance as to the application of the considerations. The following questions are raised:

Point 1 “the practice setting”

Would a nurse in a regional or rural setting require more PII as there may be less medical and general resources available?

Point 4 “consider the health status of client group”

Does this mean multiple co morbidities are more of an issue than acute episodes of care? Should a nurse working in aged care require more or less PII than a nurse working in an Intensive Care Unit?

Point 6 “the professional experience of the registered nurse or nurse practitioner”

Does the less experienced or more experienced nurse (with greater responsibility) require more or less PII cover?

Point 7 “advice from…..”

Which professional organisation would have the complete knowledge of the number and history of claims?

Where an employer is supposedly providing “PII” through their vicarious liability how is the individual nurse or nurse practitioner to access this information to ask advice?

Point 9 “the registered nurse or nurse practitioner employment status”

What is the difference between voluntary or otherwise unpaid capacity? This last point on volunteer work should stipulate within Australia (this is mentioned later in the examples). Does not cover other areas of employment, for example school nurses, who do not fall within working in either public or private health services categories.

Run-off cover (Page 5)

“Registered nurse or nurse practitioners are required to maintain run-off cover for the whole time after they have ceased to practice privately to be protected against claims that may arise in the future”. The following questions are raised:

Is this until death?

Is there a time limit?

Does this mean registered nurses and nurse practitioners employed in public or private health services are not required to have run off cover?

This statement is unclear and confusing if the intent is for all registered nurses and nurse practitioners to continue to maintain run-off cover.
Run-off cover scheme (Page 5) and Employed registered nurses and nurse practitioners (Page 5)

These two headings are one after the other with no content in between - presumably there is information missing after the Run-off cover scheme heading as the content under Employed registered nurses and nurse practitioners does not relate to the run-off cover scheme. As this guideline appears to be a cut and paste of the Guidelines for PII arrangements for midwives, presumably there is content that needs to be included and should identify the time period required for run-off cover after cessation of practice.

Employed registered nurses and nurse practitioners (Pages 5 and 6)

“Most registered nurses and nurse practitioners who are employees are covered by their employers’ insurance. Employed registered nurses and nurse practitioners are advised to check their PII arrangements with their employing organisation.”

As stated earlier, this statement is incorrect and should be removed. Employers provide vicarious liability cover and not PII as has been asserted.

Reliance on the employer’s vicarious liability insurance as PII could also lead to situations of a conflict of interest between the organisation and the individual nurse or nurse practitioner should a claim arise (with respect to dual liability or potential joint liability).

Employed registered nurses and nurse practitioners also working in private practice (Page 6)

“Some registered nurses and nurse practitioners may also provide services to clients while employed in public or private health services, or in private medical practices; and may also conduct part of their practice in private practice where their employer’s indemnity insurance would cover their practice.”

This is very confusing and may need an example, but in addition it appears to contradict the next paragraph where it states:

“This may arise in a formal business arrangement where a Registered Nurse or Nurse Practitioner (generally with the knowledge and agreement of their employers) has established a private practice but also works as an employee in public or private health services, or in private medical practices. Registered nurses and nurse practitioners working in private practice and working as employees must have their own PII arrangements in place to cover the services they provide for their private clients.”

One statement suggests they would be covered by their employer’s insurance and the second states they must have their own PII.

It is most unlikely that an employed nurse working outside of their employment in a private capacity would be covered by insurance provided in their employed position. It appears there has been an error in the first paragraph detailed above which suggests that the employer’s insurance “would cover” their practice when in fact it should state that it “would not cover” their practice.

There also needs to be clarity in relation to the situation where a nurse may volunteer their services not as a nurse but as a first aider. Would the requirement for PII still occur? There is no mention here of Good Samaritan acts. This should be identified as either an act that would require PII or not.
Registered nurses and nurse practitioners in private practice (Page 6)

The first paragraph in this section is very confusing and would perhaps benefit from each point/example being separated with a new line.

The last point in this paragraph states:

“Private nursing or nurse practitioner practice is where……… the only directors of that company are practicing registered nurses or nurse practitioners.”

If the company has registered nurses or nurse practitioners as directors but they also employ other nurses or nurse practitioners does this apply or only in a limited fashion? Is this statement trying to express that “if the only practising registered nurses or nurse practitioners are also directors of that company then each practising registered nurse or nurse practitioner would require PII”?

Definitions (Page 7)

“Run-off cover means insurance that protects a practitioner who has ceased a particular practice against claims that arise out of, or are a consequence of, activities that were undertaken when he or she was conducting that practice or business. This type of cover may be included in a PII policy or may need to be purchased separately.”

There is no reference to the time period required for run-off cover. The extent of run-off cover required in accordance with personal injury law varies across the state and territory jurisdictions. The limitation periods and run-off cover required for each of the eight Australian jurisdictions should be provided.

Conclusion

The Australian Nursing Federation is pleased to have been given the opportunity to provide submission to the consultation on the newly developed Guidelines for PII arrangements for nurses and nurse practitioners. We are keen for the ongoing issues in relation to the Guidelines for PII arrangements for midwives to be resolved by the NMBA.

Given the concerns outlined in our submission, the ANF requests that the issues identified with the existing Guidelines for PII arrangements for midwives are addressed and that the draft Guidelines for PII arrangements for nurses and nurse practitioners are also amended accordingly.