australian nursing federation

Submission to the Nursing and Midwifery Board of Australia on consultation paper: *Guidelines on advertising; Guidelines on mandatory notification; and Other documents for consultation.*

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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 for the ANF is the professional and industrial representation of our members and the professions of nursing and midwifery.

With a membership of over 175,000 nurses and midwives, members 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 is pleased to provide comment to the Nursing and Midwifery Board of Australia (AHPRA) on the consultation paper on codes and guidelines which has been developed under the requirements of the *Health Practitioner Regulation National Law Act 2009* (the National Law). The consultation paper comprises: *Guidelines on advertising; Guidelines on mandatory notification; and Other documents for consultation*.

2. The nursing and midwifery professions

Nurses and midwives form the largest health profession in Australia, providing health care to people across their lifespan. Nurses and midwives are the most geographically dispersed health professionals in Australia, working in homes, schools, communities, general practice, local councils, industry, offshore territories, aged care, retrieval services, rural and remote communities, Aboriginal and Torres Strait Islander health services, hospitals, the armed forces, universities, mental health facilities, statutory authorities, general businesses, and professional organisations.

There is a combined total of 244,360 registered and enrolled nurses actually employed in nursing in Australia, with 18,297 of these being midwives.[1] Nurses and midwives comprise over 55% of the entire health workforce.[2]

Numerically then, nurses and midwives make up the majority proportion of the health workforce and the nature of their knowledge, skills, experience and work means they are located in most practice environments in the health and aged care sector.

3. Consultation on codes and guidelines

The ANF notes that the National Law includes a requirement for national boards to make sure that they engage in wide ranging consultation on proposed registration standards, codes and guidelines. The ANF provides the following advice to the AHPRA on the codes and guidelines documents as these relate to the nursing and midwifery professions.

4. Guidelines for advertising of regulated health services

The ANF supports the need for there to be guidelines for health practitioners and health services in designing advertising material which will be "reliable and useful and assist consumers to make informed decisions about accessing services."

As an organisation representing the professional interests of nurses and midwives the ANF supports the professional obligations espoused in the advertising guidelines that:

> *Practitioners should always consider their professional ethical obligations and their legal obligations when advertising services.*

The ANF's own advertising protocol[3] supports the sentiments of the AHPRA guidelines by stating that advertising will not be considered for ANF publications if:

> *the content or the company is seen to exploit, misinform or misrepresent health care products or nursing services*
>
> *it promotes workplaces or employers that exploit the industrial and professional interests of nurses…*
>
> *it does not conform to World Health Organisation recommendations or meet the social justice principles of the ANF*

The ANF has no comments for additions to or deletions from the *Guidelines for advertising of regulated health services*.

In relation to the reference to students who are registered in a regulated health profession needing to be familiar with the advertising guidelines, the ANF requests that the AHPRA ensure that students of nursing and midwifery undergraduate programs are advised of the existence of all codes and guidelines under the National Law.

5. Guidelines for mandatory notifications

The ANF understands the obligation to report notifiable conduct will be required from July 2010. The ability of nurses' and midwives' ability to adhere to their codes of ethics, codes of professional conduct, to meet the various national competency standards and to work within scope of practice to ensure safe patient outcomes, is well recognised. Nurses and midwives accept that they have an obligation to report a practitioner whose behaviour is unprofessional, and evidence suggests that this obligation has always been taken seriously despite the fact that it has not been mandatory.

5.1 Specific Comments

Practise while intoxicated by alcohol or drugs (s. 140(a))

The ANF has a concern that the ordinary meaning of intoxication, that is: *capacity to exercise reasonable care and skill in the practice of the health professional is impaired or affected as a result of being under the influence of drugs or alcohol*, may encourage subjective assessment and, that with an obligation to notify, this may result in spurious notifications.

Sexual misconduct in connection with the practice of the practitioner's profession (s. 140(b))

The Guidelines state: *Engaging in sexual activity with a current patient or client will constitute sexual misconduct in connection with the practice of the practitioner's health profession*. While indeed the intent of this aspect of the Guidelines is clear, there are concerns that pre-existing relationships are not considered, and excluded - that is, noted as an exception to the criteria for sexual misconduct. In rural areas, in particular, health practitioners at times find themselves caring for their spouse. It is unclear as to what would constitute notifiable misconduct in these circumstances and some concrete examples in the Guidelines would be of assistance.

Protection from liability for persons making notification or otherwise providing information

The ANF understands that s237 of the National Law Bill 2009 indemnifies persons making a notification or providing information in *good faith*. However, there is a need to contemplate the possibility of vexatious or malicious notifications - that is, not made in good faith. There may be a case to argue that persons who make a notification that was found not to have been made in good faith would be seen to be in breach of their Code of Ethics. Inclusion of this consequence in the Guidelines may act to safeguard practitioners from personal vendettas, acts of revenge, and other motivations to notify for reasons other than 'in good faith'.

Reasonable belief

The definition of 'reasonable belief' requires some clarification. The notion of reasonable in the draft Guidelines includes:

> *A report should be based on personal knowledge of facts or circumstances that are reasonably trustworthy…*

The phrase *"circumstances that are reasonably trustworthy"* is problematic because it reduces objectivity and may allow subjective assessment which could cause inappropriate reports.

The Guidelines state that a reasonable belief requires a stronger level of knowledge than a mere suspicion and generally it would involve direct knowledge or observation. Omission of the word 'generally' would have the effect of providing clearer guidance and require less subjectivity thereby reducing the likelihood of actions being taken out of context, as follows:

> *A reasonable belief requires a stronger level of knowledge than a mere suspicion. It would involve direct knowledge or observation of the behaviour which gives rise to the notification……..*

Alternatively, conclusive proof in the form of first hand accounts - that is, the actual witnessing of behaviour that constitutes notifiable conduct - should be required. Given the mandatory nature of the obligation to report, with sanctions for those who fail to report, caution needs to be exercised to ensure practitioners do not make assumptions, and report unusual behaviour (which would not satisfy the definition of notifiable conduct) or second hand accounts, for fear of themselves being penalised.

Mandatory versus voluntary notification

The National Law also provides for voluntary notifications for behaviour that presents a risk but does not meet the threshold for notifiable conduct. As stated, the threshold to be met to trigger a mandatory notification is high. Care needs to be exercised to avoid confusion – does this now follow that the threshold to trigger a voluntary notification is medium? Such subjectiveness runs the risk of practitioners, especially those new to the profession, jumping to incorrect conclusions.

The diagram *Decision guide – notifying impairment in relation to a practitioner* (page 4 of the Guideline) does not provide clear directions in the decision making flow chart. In one of the boxes, there is the question: "Did the risk of substantial harm to the public arise in the practitioner's practice of the health profession?" "NO". The next box below states "Consider a notification under s.140(d) (significant departure from accepted professional standard) or a voluntary notification. What does this mean? If you have stated "No" to the preceding question, why would another avenue of notification need to be considered? If the intent is to provide guidance about not just whether to notify, but also about what type of notification - mandatory and voluntary - then an additional question or set of questions may be warranted. This is so that the potential notifier can be assisted in his/her decision about whether to voluntarily report – or not report at all. It would be helpful to the reader to provide concrete examples in this section of the Guidelines.

5.2 Issues of concern

1. Self-reporting

The mandatory requirement is not consistent with current scholarship and practice with regard to open disclosure, a systems approach to adverse events, and a no blame approach.

Importantly, we are concerned that the threat of being reported will act as a major disincentive to those nurses and midwives (and for that matter all health practitioners) who have made an error. Instead of being able to trust a no blame system, a health practitioner may be disinclined to disclose an honest error in a timely manner, and may cause further harm to occur due to the fear of being reported.

Johnstone and Kanitsaki, in a 2005 article, state:

> *…….it is important for the profession to accept that honest errors by clinicians are rarely the product of 'system flaws not character flaws' Leape 1994) and that practitioners who make mistakes are not necessarily bad, a threat to the public interest, or guilty of unprofessional conduct … Accordingly as Woods and Doan-Johnson (2002) suggest, NRAs need to 'develop an approach to the regulation and reporting of errors that will increase knowledge and incentives for error detection, reporting and prevention while fulfilling the duty to protect the public from unsafe practice'. If such an approach is not taken, it is likely that those who make mistakes will be driven underground' by a deep seated fear (real or imagined) of recrimination. In turn, their errors will not be reported (or at least will be under-reported) and the profession and the public will be denied a valuable opportunity to learn from mistakes.*[4]

2. Mandatory reporting/notification by health practitioners

The mandatory notification obligation applies to all practitioners and employers of practitioners in relation to the notifiable conduct of all practitioners, not just those in the same health profession as the practitioner. It applies where the notifying practitioner is also the treating practitioner for a practitioner. (2nd para page 2 of the Guideline)

The ANF is concerned as to how this may sit with the confidentiality inherent in the health professional-patient relationship, and with the various health programs that operate within the Privacy Act and the Health Records Act, for example the Victorian Nurses Health Program. The requirement of mandatory reporting may in fact render such programs - which have a focus of prevention, early intervention, risk management and rehabilitation - redundant. Notification will invariably lead to a formal investigation process resulting in a range of outcomes - from no action to deregistration.

3. Exceptions to the requirement of practitioners to make a mandatory notification

The ANF is an organisation that performs an advocacy role, representing the industrial and professional interests of members, both collectively and individually. The majority of our officers and organisers are registered nurses and midwives. The ANF performs an important role in the provision of timely advice to our members about practice issues. We are concerned that the Guidelines (and the legislation), as they currently read, will result in ANF staff across the country being placed in precarious situations, as they are faced with, on the one hand the responsibilities associated with being an advocate, and on the other as registered health professionals, having a legislative requirement to report a member based on what the member may disclose as confidential information.

It appears organisations such as the ANF are not included in the exceptions, but we seek such inclusion as exempt or authorisation for exemption, so that we may continue to perform this vital role in the provision of assistance for nurses and midwives.

4. Mandatory notifications by education providers and practitioners in relation in to impaired students

As stated previously, the concepts of reasonable belief and impairment are problematic, regardless of setting. However, education providers are required to adhere to organisational policies with regard to access and equity. The ANF is aware of anecdotal evidence where adherence to such policies has overruled an educator's concern about a student's impairment, and where an appeal by the prospective student to a tribunal has been upheld. Consideration should be given to the provision of advice by the National Agency when equity principles have overruled an education provider's decision to not accept an individual into a course because of impairment.

With regard to a student who is suspected of having a mental health impairment, it is often difficult for an education provider to assess a student's mental health status with any degree of certainty. Counselling and appropriate referral would be a far more preferable way forward for both parties, with notification then being made after the health status of the student has been accurately assessed.

6. Other documents for consultation

The ANF strongly supports the adoption of the *Australian Nursing and Midwifery Council (ANMC) Professional Practice Framework© (PPF)* by the Nursing and Midwifery Board of Australia. The ANMC consulted extensively with a broad range of stakeholders to develop and review the professional standards, codes and guidelines for nurses and midwives that make up the Framework.

The overview of the Professional Standards detailed in the consultation paper is incomplete. The ANMC *A Nurse's Guide to Professional Boundaries* and the ANMC *A Midwife's Guide to Professional Boundaries* should be included. The *Guidelines for Delegation and Supervision for Nurses and Midwives* document has now been superseded by the ANMC *Decision Making Framework*. It is the understanding of the ANF that the guidelines *Responsibilities of Nurses and Midwives in the Event of a Declared Emergency* will require review as they focus on mutual recognition requirements that will no longer be relevant under national regulation. The *National Competency Standards for the Enrolled Nurse* and the *Principles for the Assessment of National Competency Standards for Registered Nurses and Enrolled Nurses* are also both in need of review.

It is also of note that the *Code of Ethics for Nurses* is jointly owned by the ANMC, the ANF and Royal College *of* Nursing *Australia* and the *Code of Ethics for Midwives* is jointly owned by the ANMC, the ANF and the Australian College of Midwives.

The ANF recommends that the Nursing and Midwifery Board of Australia adopts the following documents:

Competency Standards

National Competency Standards for the Registered Nurse

National Competency Standards for the Enrolled Nurse (require review)

National Competency Standards for the Midwife

National Competency Standards for the Nurse Practitioner

Code of Ethics and Professional Conduct

Code of Ethics for Nurses in Australia (ANMC, ANF, RCNA)

Code of Professional Conduct for Nurses in Australia

Code of Ethics for Midwives in Australia (ANMC, ANF, ACM)

Code of Professional Conduct for Midwives in Australia

Principles for the Assessment of National Competency Standards

Principles for the Assessment of National Competency Standards for Registered Nurses and Enrolled Nurses (require review)

Decision Making Framework

Decision Making Framework – Final Framework

Professional Boundaries

A Nurse's Guide to Professional Boundaries

A Midwife's Guide to Professional Boundaries

Guidelines

Guidelines on Telehealth Practice for Nurses and Midwives

The Responsibilities of Nurses and Midwives in the Event of a Declared National Emergency (require review)

7. Conclusion

The ANF, in consultation with the State and Territory Branches, has reviewed the set of national guidelines to be applied by the Nursing and Midwifery Board of Australia. The draft guidelines on advertising and mandatory notification cover a comprehensive range of issues. Comments provided in this submission are intended to strengthen the draft guidelines presented to aid clarity, fairness, and usefulness for the nursing and midwifery professions.

The ANF has been a strong supporter of the move to national registration and accreditation for health professions in Australia. The enactment of legislation to introduce the National Registration and Accreditation Scheme for the Health Professions (NRAS) on 1 July 2010 will have a significant and positive impact on the nursing and midwifery professions.

The ANF has consistently provided assistance and advice to the development of legislation and policies relating to the establishment of the new Scheme, through verbal and written communications, either as an individual organisation or in conjunction with other peak nursing and midwifery groups. We therefore look forward to participating in on-going consultations to develop and refine the professional standards and legislation required to underpin the introduction of the National Registration and Accreditation Scheme for Health Professionals.

References

1. Australian Institute of Health and Welfare 2008. *Nursing and midwifery labour force 2005*. Additional Material. Table 1. Available at: http://www.aihw.gov.au/publications/hwl/nmlf05/nmlf05-xx-registered-nurses-clinical-area.xls

2. Australia's Health 2006, p 317.

3. Australian Nursing Federation. 2006. *Advertising protocol.* Internal policy.

4. Johnstone MJ and Kanitsake O 2005: *Processes for disciplining nurses for unprofessional conduct of a serious nature: a critique.* Article in Blackwell Publishing Ltd, Journal of Advanced Nursing, 50 (4), 363-371