Guidelines for professional indemnity insurance arrangements for registered nurses and nurse practitioners

Response to consultation

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For further information and comment, please contact Australian Practice Nurses Association on (03) 9669 7400 or admin@apna.asn.au.

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Introduction

APNA is the peak professional body for nurses working in primary health care including general practice. With more than 3000 members, APNA provide primary health care nurses with a voice, access to quality continuing professional development, educational resources, support and networking opportunities. APNA continually strives to increase awareness of the role of the primary health care nurse, and to be a dynamic and vibrant organisation for its members.

APNA is very concerned about the ambiguity within the proposed guidelines and encourages the National Board to undertake a substantial revision prior to their endorsement. The reasons for APNA's concerns and suggestions for revision follow.

The requirement itself must be clarified

APNA understands that the intention of the legislation and regulation is to *require* practitioners to:

- Ensure that their professional practice is covered by effective professional indemnity insurance (PII) arrangements, and
- Practice within the scope of PII arrangements covering their work.

This, as APNA understands it, is a *requirement borne by the practitioner*.

If this is the case, then many parts of the proposed guidelines, rather than being *requirements*, are:

- Tactics that a practitioner might/should use to determine how they could meet the requirement of ensuring that their professional practice is covered by effective PII arrangements,
- Suggestions of matters to put one's mind to in choosing a model of PII, or
- Statements that encourage practitioners to explore the issues thoroughly.

Whether or not these tactics are used might be a consideration in disciplinary contexts, but could be distinguished from the core *requirement* on the practitioner to ensure effective cover is in place.

Recommendation 1:

It is recommended that the National Board clarify in the guidelines whether or not it *requires* nurses, regardless of their employment arrangement, to *ensure* that the required aspects of their professional practice are covered by effective PII arrangements.

Recommendation 2:

It is recommended that the National Board reserve the use of the word 'require' for the requirement to ensure PII cover and practice within the scope of that cover; and use terms such as *should/might/could* where the text refers to tactics that a practitioner could use to inform the decision about the scope and nature of the PII.

Arguably, the existing guidelines are based on the view that employers will be vicariously liable for the actions of their employee-nurses/nurse practitioners. This view is contested, as demonstrated in previous submissions to the National Board from the Australian Nursing Federation (ANF). APNA supports those concerns.

Employee registered nurses and nurse practitioners might advise on the nature of PII required for their professional practice. They are not, necessarily, able to control the purchase of desirable PII by their employer. In effect, where they seek cover under PII arrangements of their employers, such employed practitioners are only in control of whether or not to practice within the scope of the PII arrangements made by their employer.

As a result, employed registered nurses and nurse practitioners need explicit and authoritative advice from their employers about:

- The extent to which their employer's PII covers the employee-nurse/nurse practitioner's professional practice, and
- All aspects of professional practice that are NOT covered by the employer's PII.

Aspects of professional practice that are not covered would either restrict the professional practice of the practitioner or require specific indemnity insurance cover to be held by the practitioner.

Effective disclosure of the extent of PII is not in the control of the registered nurses and nurse practitioners, but in the control of employers. As the Board imposes requirements on nurses, the way(s) in which the Board could ensure disclosure by employers remains unclear to APNA.

Although APNA considers the provision of expert information tailored to the professional practice of nurse-employees to be an onerous burden on employers, and also takes the view that the provision of such information is likely to be a disproportionate burden on small and innovative employers, thus creating a disincentive for advances in professional practice; it is unclear what other mechanism could be used to ensure that nurses are secure in their position concerning PII arrangements.

The undesirable default position is that registered nurses and nurse practitioners cannot rely on their employers to meet the requirements that the National Board imposes on the nurses, and thus, that nurses must take out their own PII.

Recommendation 3:

It is recommended that the National Board investigate ways in which employers can be required to disclose expert/authoritative information about the extent to which employer-based professional indemnity insurance covers the full scope of professional practice by employed registered nurses and nurse practitioners in a cost-effective manner.

Recommendation 4:

It is recommended that until employers are *required* to disclose expert/authoritative information about the extent to which employer-based professional indemnity insurance covers the full scope of professional practice by employed registered nurses and nurse practitioners, nurses be cleared warned in the guidelines about the potential to be under-insured, and that such warnings carry case examples of the limitations.

APNA's comments about the effectiveness of the apparent *guidance* for nurses when ensuring effective PII appear towards the end of this submission.

The scope of required cover must be clarified

APNA understands the current legislation and regulation to require a registered nurse or nurse practitioner not to practice unless:

> 'appropriate professional indemnity insurance arrangements are in force in relation to the practitioner's practice of the profession'.

This requirement is easily construed to mean that the professional indemnity arrangements need to cover ALL aspects of the practitioner's professional practice.

Such an interpretation is strengthened by the statement that:

> 'The National Board requires that registered nurses and nurse practitioners have PII arrangements to cover the *full scope of their practice*, whether they are employed in public or private health services or in private medical practices; or self-employed and working in private practice.' (emphasis added)

However, the proposed guidelines also state that:

> 'The National Board does not require practitioners to have insurance cover for matters which do not involve potential of compensation against a practitioner.'

Elsewhere, the proposed guidelines suggest that the *required* cover pertains to aspects of professional negligence. This suggests that there is not a *requirement* to have professional indemnity insurance arrangements in place for ALL aspects of professional practice.

One interpretation of the statement from the proposed guidelines above pertaining to matters for which the Board does not require practitioners to have insurance cover, is that the Board requires practitioners to have cover where harms to patients are involved, but not where there are harms to nurses themselves (e.g. other civil wrongs such as defamation). APNA finds such a distinction problematic and cannot support it.

The guidelines must make clear the National Board's intent with respect to scope of PII cover. The principles on which any distinction between aspects of practice that *must* be covered by insurance arrangements and any aspects of practice that need not be covered by insurance arrangements are absent from the proposed guidelines. An articulation of the principles on which any such distinction is made would assist to ensure that the *requirement* remains clear despite ongoing changes in the tort law in Australia.

Recommendation 5:

It is recommended that the National Board clearly articulate in the guidelines the principles by which any and all areas of professional practice for which a practitioner is not *required* to ensure that professional indemnity insurance arrangements are in place, are made.

Recommendation 6:

It is recommended that the National Board clearly articulate in the guidelines any and all of the areas of professional practice for which a practitioner is not *required* to ensure that professional indemnity insurance arrangements are in place.

The material provided by the National Board for comment indicates that:

> 'Professional indemnity arrangements that registered nurses and nurse practitioners *should* consider include:
>
> - civil liability cover,
> - unlimited retroactive cover, and
> - run-off cover.' (emphasis added)

APNA is concerned that discussions about retroactive cover and run-off cover are at odds with the mobility of nurses, their decisions to move from publicly-funded to privately-funded services (and vice versa); and the way in which nurses take periods of leave from professional practice over a lifetime of nursing.

Apart from practitioners still in their first job and covered by effective PII, the circumstances in which a registered nurse or nurse practitioner could meet the intended outcomes of the legislation (as APNA understands them) and practice without retroactive cover are unclear to APNA. Many nurses move across employed arrangements. As APNA understands this, such movement is likely to result on a loss of insurance cover for professional practice during the period of previous employment (if, indeed, such cover exists in the first instance), unless specific arrangements are made for appropriate PII.

This workforce movement, characteristic of nursing in Australia, provides a potential 'loophole' in the protections for both people provided professional services and practitioners providing professional services. The issue appears to be absent from the proposed guidelines.

APNA takes the view that it is important for the basis of decisions whether (or not) to hold retroactive and run-off cover are clear for registered nurses and nurse practitioners. It would be costly for practitioners to seek such information as individuals.

Recommendation 7:

It is recommended that the National Board seek expert advice as to the impact of changes in employment during a career in nursing on the need to have retroactive cover and confirm the range of circumstances in which nurses should hold such cover in order to meet the intent of the legislation.

Recommendation 8:

It is recommended that the National Board make publicly accessible, the expert advice as to the impact of changes in employment during a career in nursing on the need to have retroactive cover.

Recommendation 9:

It is recommended that the National Board clearly articulate more clearly in the guidelines the circumstances that *require* registered nurses and nurse practitioners to *ensure* that they are covered by arrangements that provide unlimited retrospective cover.

The proposed guidelines indicate that:

> 'Registered nurses and nurse practitioners in private practice are also required to have 'run-off cover'.'

It is clear that many Australian registered nurses and nurse practitioners leave the workforce prior to 'retirement' for a number of reasons. Some of these practitioners return to the workforce, having maintained their registration. Some intend to return, and having maintained registration, allow their registration to lapse.

For nurses who have been employees, the question of whether or not run-off cover is required appears to relate, in part, to whether the PII arrangements of the previous employer(s) extend to fully cover the nurse.

It appears that the requirements apply only to nurses who are registered. Thus, there appears to be no requirement on registered nurses or nurse practitioners who have retired or otherwise ceased practice, and who cease to be registered to hold any form of residual PII. APNA presumes that this is because the National Board has no jurisdiction over their actions.

Recommendation 10:

It is recommended that the National Board seek expert advice as the range of circumstances in which nurses should hold run-off cover in order to meet the intent of the legislation.

Recommendation 11:

It is recommended that the National Board make publicly accessible, the expert advice as to the circumstances in which practitioners need to hold retroactive cover.

Recommendation 12:

It is recommended that the National Board clearly articulate more clearly in the guidelines the circumstances that *require* registered nurses and nurse practitioners to *ensure* that they hold run-off cover.

Recommendation 13:

It is recommended that the National Board clearly articulate in the guidelines whether or not, prior to relinquishing registration, any requirement to purchase PII is mandated.

The adequacy of the required professional indemnity insurance cover must be articulated

APNA understands the central intent of professional indemnity insurance arrangements to be to provide adequate and effective protection for people harmed in the course of nursing professional practice. If this is the case, the potential of 'under-insuring' exists.

APNA understands, for example, that some nurses hold professional indemnity insurance that is 'in the aggregate'. Arguably, this type of insurance involves no substantive assessment of the actuarial considerations involved in individual circumstances by an insurance broker. It appears to rely on the assumption that claims will be small and infrequent. Such a proposition must be contested if one takes a future-looking perspective. One could anticipate that as nurses take a larger role in health services, and their role (including its autonomy and basis of expertise) is increasingly well understood by the community, they will be more frequently the targets of claims in tort. Arguably, in addition, this insurance

cover 'in the aggregate' is significantly affected by claims by other parties insured under the policy, not in the control of the insured nurse.

APNA has no substantive expertise in assessing the effectiveness of various models of insurance cover, and is aware of concerns about some models amongst its members.

Recommendation 14:

It is recommended that the National Board seek expert advice as to the adequacy of PII cover that is 'in the aggregate'.

Recommendation 15:

It is recommended that the National Board express its requirement(s) as to the adequacy of PII cover that is 'in the aggregate' within the guidelines.

Adequacy of the 'guidance'

APNA would be concerned at any suggestion that the guidelines provide an alternative to the seeking of expert advice on professional indemnity cover.

APNA takes the position that the appropriate role for the guidelines is to provide registered nurses and nurse practitioners with a checklist of matters they need to consider before seeking PII cover and during the negotiations over arranging PII cover.

In this context, APNA's approach suggests that two domains of risk need to be considered.

The first domain of risk is that which pertains to the individual practitioner. APNA suggests that the practitioner needs to consider issues such as:

- The scope of their practice, including clinical, managerial, educational, research and voluntary areas of professional practice
- The scope and adequacy of their formal and informal education and training, particularly
- The scope and nature of any authorisations to practice (e.g. to immunise)
- The degree to which their professional practice includes areas that are relatively new to nursing practice (and thus, for which the risk profile may be uncertain or higher)
- Their personal history of events, notifications and claims relating to civil wrongs
- Any impairment or disability that could affect the consistency and safety of their professional practice.

The second domain of risk relates to the work setting. APNA suggests that the practitioner needs to consider:

- The presence of an overt, just and healthy 'safety culture' in the setting
- The health needs of the clients to whom professional services will be provided
- The scope of services that the practitioner will participate in providing
- The risk profile of the services that the practitioner will participate in providing, including the likelihood of 'boundary violation'
- The presence and reliability of safety systems managed by the setting (e.g. clinical audits, computerised alerts, briefing and debriefing)
- The volume of patients seen in the context of the available resources

- The consistency with particular clinical issues are seen, especially where psycho-motor skills are critical and where the evidence-base is changing more rapidly than usual
- The degree of autonomy in the setting
- The degree of professional isolation in the setting
- The presence of incivility (e.g. rudeness, bullying and threats)
- The systems of support provided by the setting for non-clinical services (e.g. protocols for research, materials for education)
- The history of near misses, adverse events, notifications and claims against the organisation
- Their employment status and the relationship of their employment status to PII arrangements held by stakeholders at the work setting.

The financial implications of the requirement must be acknowledged

The historical position is such that nurses employed by public authorities and larger organisations have had PII for many aspects of their professional practice paid for by the employers. In contrast, the relatively recent introduction of a *requirement* to ensure PII arrangements are in place for nurses in many smaller and private organisations has, in effect, imposed a cost on these nurses, as they have found themselves paying for professional indemnity insurance.

Whether or not employment by public authorities or larger organisations does, in fact, provide PII that meets the legislative intent, the current situation disadvantages new areas of nursing. In the Australian context, the costs, arguably, are disproportionately borne by nurses who:

- Choose to work in innovative fields
- Work in areas in which the various levels of government subsidies, rather than fully-fund the costs of health care to patients (e.g. areas of nursing where patients are subsidised under the Medicare Benefits Schedule), especially those who endeavour to support access to health services for people with low incomes.

APNA considers these structural results of the current arrangements to be contrary to the best interests of the community, and contrary to the best interests of the nursing profession in Australia. The National Board may consider that these are industrial matters. APNA would argue that, because they result from actions by the Board, and because they affect, disproportionately, areas of nursing with less industrial power, the Board must play a role in addressing the burden on nurses.

Recommendation 16:

It is recommended that the National Board needs to consider ways in which it can facilitate a level playing field for nurses with respect to the costs of professional indemnity insurance.