



australian
nursing federation

Submission to Consultation Paper

'Proposed arrangements for handling complaints and
dealing with performance, health and conduct matters'

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Introduction

The Australian Nursing Federation (ANF) was established in 1924. The ANF is the national union for nurses and midwives, with Branches in each State and Territory of Australia.

The ANF is also the largest professional and industrial organisation in Australia, with a membership of over 170,000 nurses and midwives, employed in a wide range of enterprises in urban, rural and remote locations in both the public and private sectors. The ANF's core business is the industrial and professional representation of our members and of the industry of nursing and midwifery.

The ANF participates in the development of policy in nursing, nursing regulation, health, community services, veteran's affairs, education, training, occupational health and safety, industrial relations, immigration, foreign affairs and law reform.

We refer to your paper of 7 October 2008 inviting comments on the 'Proposed arrangements for handling complaints and dealing with performance, health and conduct matters' to be submitted to the Practitioner Regulation Subcommittee by Friday 21 November, 2008.

The nursing and midwifery professions continue their strong support for the establishment and implementation of a national regulation and accreditation scheme, ensuring protection of the public and maintaining the highest standards of nursing and midwifery services through a transparent and well designed model.

The eight state and territory Branches have reached a consensus view in relation to the matters raised in your correspondence and we are pleased to provide the following comments. The numbering of our submission reflects that of your consultation paper.

Introductory comments

Prior to addressing the consultation paper the ANF is compelled to raise a range of concerns in relation to the complexity of governance structures, complaints process and separation of powers.

The ANF views the proposed model as mixing function and control and does little to give assurance or confidence to either the public or the professions.

It appears the Board can instigate an investigation at its own motion, receive notifications, control investigations, prosecute and hear all non serious matters.

In addition serious matters are referred to a single entity capable of hearing matters that is not appointed or controlled by the Board.

The ANF in South Australia has made supplementary submissions specifically aimed at advancing an alternative model to deal with concerns raised in relation to governance and notifications processes. The ANF is supportive of the South Australian branch proposal.

Notwithstanding the foregoing, the ANF state and territory branches feel there is no alternative but to respond to the consultation paper and relevant questions as proposed. However, we are committed to having the decision makers in this process seriously consider the alternatives that have been raised.

1.5 Principles

1.5.1 The ANF supports principles (a)-(e) but would seek an additional point (f) is managed in a framework of natural justice and procedural fairness.

2. Proposed terminology

2.1.1 The ANF supports the term ***notification***.

2.1.2 The ANF supports the term ***preliminary assessment***.

2.1.3 The ANF supports the proposal and the terminology ***notifications assessment committee***.

2.1.4 - 2.1.8

The ANF supports these proposals.

2.1.9 The ANF agrees with the term ***health assessment*** rather than medical examination.

2.1.10 The ANF supports the term ***health panel*** or ***health assessment panel***.

2.1.11 - 2.1.14

The ANF supports these proposals.

2.1.15 The ANF has previously supported the term 'fit and proper' but in common law history 'good character' usually goes to descriptions of professional conduct including honesty, integrity, professionalism, moral strength and respect for others which may be closer to the description needed for the purposes of the legislation. As such the ANF would support either term however, our preference remains the use of 'fit and proper' as it already is widely accepted in nursing and midwifery.

2.1.16 The ANF supports the terminology but suggests the word '*habitual*' be removed and referred to as ***impairment due to alcohol or other drugs***.

2.1.17 - 2.1.18

The ANF broadly supports the proposals, however, there have been concerns raised there is little difference between unsatisfactory professional performance and unsatisfactory professional conduct. The ANF suggests the following definitions are considered as they may clarify the situation:

- 1) For the purposes of this Act, '**professional misconduct**', in relation to a nurse or midwife, means unsatisfactory professional conduct of a sufficiently serious nature to justify the removal of the nurse's or midwife's name from the Register or the Roll.
- 2) For the purposes of this Act, '**unsatisfactory professional conduct**', in relation to a nurse or midwife, includes any of the following:
 - (a) any conduct that demonstrates that the knowledge, skill or judgment possessed, or care exercised, by the nurse or midwife in the practice of nursing or midwifery is significantly below the standard reasonably expected of a nurse or midwife of an equivalent level of training or experience;
 - (b) the nurse's or midwife's contravening (whether by act or omission) a provision of this Act or the regulations;
 - (c) the nurse's or midwife's failure to comply with an order or determination made, or a direction, or with a condition of registration or enrolment;
 - (d) the nurse's or midwife's failure without reasonable excuse to comply with a direction by the Board to provide information with respect to a complaint under this Act against the nurse or midwife; and
 - (e) any other improper or unethical conduct relating to the practice of nursing or midwifery.

2.1.19 The ANF supports this proposal.

3. Overview of proposed system

3.2 Key features of the proposed system

Diversity of forms

The ANF supports the proposal.

Receipt of notification

The ANF supports the proposal.

Preliminary assessment notification

The ANF supports the proposal.

Consultation with the HCC

The ANF supports the proposal.

Performance, health and conduct management

The ANF supports the proposals.

Board hearings

The ANF supports the proposal.

Referral for tribunal hearing

The ANF supports the proposal.

3.3 Proposed definitions for what constitutes a departure from professional standards

- 3.3.1 In response to the proposal the ANF refers to the definition suggested at 2.1.17-18.

4. Notifications

- 4.1.1 The ANF supports the proposal that an employing organisation can make a complaint for the purposes of the section.
- 4.2.1 The ANF supports the proposal.
- 4.2.2 The ANF supports the proposal.
- 4.3.1 The ANF supports the proposal. Please refer to the ANF comments 2.1.15 in relation to the final dot point and removal of the word 'habitual' in the second dot point as previously explained. We also suggest an additional dot point should include a provision for an allegation that a person has been 'holding out' as a registered health practitioner.
- 4.3.2 The ANF supports the proposal with the following amendment:
It is proposed the legislation provide for a notification to be made (and accepted by the board and acted upon, **at the board's discretion**) in relation to a practitioner. The Boards discretion must include serious consideration of the need to prosecute a non registered professional as it is no longer in the public interest.

4.4 Mandatory reporting obligations

The issue of mandatory reporting currently has differing outcomes in many states and territories; the ANF supports option 1A and 2B.

Student registration and mandatory reporting

As raised in previous submissions the ANF does not at this time support the registration of students. We believe there is significant consultation with the profession and others that would need to occur prior to the ANF agreeing to such a proposal. Clearly, the consultation in relation to the issue would need to include matters you have raised in the consultation paper.

The ANF position is that student registration and associated matters including mandatory reporting should not be dealt with in the legislation.

4.5 Protection of Notifiers

- 4.5.1 The ANF does not support the proposal if the notification made is found to be spurious or vexatious. The view of the ANF is that protection should only be afforded to notifiers, and persons who provide the notifier with information in circumstances where they have reasonable grounds for making the notification. The test should be that the notifier believes 'on reasonable grounds' the substance of his or her notification. Reasonable grounds implies the existence of a fact or state of facts and not the mere belief by the person that the fact or state of facts existed. Greater protection would be provided to registrants against malicious notifications and a remedy for damage caused by malicious notifications without having any impact on the liabilities of people who make appropriate notifications to boards.

4.7 Immediate suspension powers

4.7.1 and 4.7.2

It is the position of the ANF that immediate suspension provisions must ensure the rights and interest of the public are balanced against those of the registrant. This means the registrant must be provided with adequate opportunity to be represented and heard prior to the suspension being imposed. Further, adequate provisions must be made that enable the suspended registrant to seek a review of the order by the panel that imposed the suspension and to appeal the decision from a decision-making body other than the panel that imposed the suspension order. If suspension is immediate then the ANF believes it should only remain in place for 21 days prior to a review being commenced and completed.

- 4.7.3 The ANF supports the proposal.

5. Preliminary assessment of notifications

5.2.1 The ANF agrees with the proposal with an addition at dot point 2 that a time limit should be included in the legislation.

5.3.1 The ANF supports the proposal however we would suggest that the precise role and boundaries of the HCC are not clear in the proposal and should be more clearly articulated.

5.4.1 The ANF supports the proposal.

5.5.1 The ANF strongly disagrees with the proposal. It would appear from our reading that this proposal envisages a system where the notification assessment committee can decide on a sanction which affects the rights and privileges of a registrant in the complete absence of any submission from the registrant. The proposal constitutes a serious violation of the principles of procedural fairness. The preliminary assessment should be no more than a channelling of notifications to ensure they are dealt with by the proper committee at which stage the registrant should be notified and given an opportunity to respond.

5.5.2 The ANF strongly disagrees with the proposal. No referral should occur until the registrant has been afforded an opportunity to make submissions in relation to the notification.

5.5.3 The ANF strongly disagrees with giving the complainant reasons for the decision.

5.6 Notifiers' rights of review of preliminary assessment decisions

The ANF supports option 1; there is no right of review of preliminary assessment decisions for the notifier. Notifiers have a number of jurisdictions in which they can obtain assistance or seek review of complaints against registrants, including the Ombudsman. Given the alternatives available to notifiers the necessity to establish a costly internal board review process seems unwarranted. This additional process in our view would add significant additional cost that would need to be recovered through registrant's fees.

6. Performance matters

6.1.1 The ANF supports the proposal but there should be an inclusion where the power of the board is limited to 'reasonable grounds' for believing a competency issue exists.

- 6.2.1 The ANF supports the proposal.
- 6.2.2 The ANF supports the proposal but it should be amended as follows:
It is proposed that a board or performance management committee have the powers, following receipt of a performance assessment report **and affording the registrant an opportunity to respond to the findings of the performance assessment report to;**...
- 6.3.1 The ANF supports the proposal.
- 6.3.2 The ANF supports the proposal but believes that 7 days is insufficient time, 14 days is more reasonable. In addition we believe the proposal needs to also include reference to a health practitioner's right to representation with respect to receiving decisions. In our view the proposal should be amended as follows:
It is proposed the legislation would require the performance assessors to provide a report of the assessment to the board or performance management committee, and, within 14 days to the practitioner. **The board will allow the practitioner an opportunity to respond to the matters raised by the report.**
The chair or nominee of the board or committee would, **following the board or committee considering the report and the registrants response, if any, and making a determination as provided for in proposal 6.2.2,** be required under the legislation to discuss the report with the practitioner, and in the case of an adverse finding, possible ways of dealing with that finding, including whether the practitioner is prepared to alter the way they practise
- 6.4.1 The ANF supports the proposal, however, currently the proposed legislation would permit a situation where a panel may comprise an even number of members; this would not allow adequate or appropriate functioning of the panel, therefore we would recommend three members as optimal, with no less than two thirds of the members being registrants from the profession concerned.
- 6.5.1 It is the position of the ANF the legislation should make provision to refer or decline to deal with a matter with common facts relevant to other boards or agencies at the earliest opportunity. The Registrar or similar should be given clear authority to refer or decline to proceed with a matter on the basis it is being dealt with elsewhere to avoid parallel or competing investigations or hearings. Alternatively, the board or performance panel should have the power to decide to adjourn a matter or hold in abeyance a matter subject to an investigation by another body, eg police, employer, or HCC pending the outcome of the other investigation.

- 6.5.2 The ANF supports the proposal however we are concerned that referring to previous performance assessment in the absence of time limits and evidence of resolution is dangerous. The phrase ‘pattern of poor performance’ requires there to be some temporal link between the alleged performance issues to establish a ‘pattern’. Prior matters must be contemporaneous and of similar nature. A previous performance issue entirely unrelated and temporally distant to the issue in question in a current investigation should be given little prohibitive weight by a performance panel. This must be explicitly stated in the legislation.
- 6.5.3 The ANF believes the registrant should be notified of the panels’ decision and reasons within 28 days but we do not support the complainant being notified of the reasons as there may be instances where the reasons for disclose matters confidential to the registrant.

7. Health or impairment matters

- 7.1.1 The ANF supports the proposal.
- 7.1.2 The ANF supports option 1. Currently Victoria is the only state that has a nurse health program specifically designed to assist registrants either through self referral or employer/board referral for issues in relation to alcohol or other substance abuse/addiction and support for mental health issues as a result of impairment due to alcohol and drug use.

The ANF strongly agrees with the Victorian nurse health program (VNHP) that early identification and intervention have the capacity to work seamlessly with registrants, boards and employers with a high level of trust and co-operation, thereby assisting protection of the public.

Furthermore, the ANF believes that we have the perfect opportunity whilst designing a contemporary national registration scheme to adopt the aspects of the current system; this is certainly a model that should not add additional cost to the registrant but must be replicated in nursing and midwifery

7.2 Health management

As previously stated in the ANF response, the ANF would recommend a change in terminology throughout the document to refer to ***impairment due to alcohol or other drugs*** rather than habitual misuse of drugs and other substances. The change is consistent with the ANF’s previous submissions in relation to the proposed handling of registrations.

The ANF would also submit that a registrant's right to be accorded procedural fairness in health assessment process exists from the moment that a board receives information that alleges a registrant has a physical or mental impairment, **or impairment due to alcohol or other drugs**. The registrant should be notified immediately the board has received an allegation and that there is an intention to have the registrant assessed. The registrant should be invited to provide submissions in relation to the allegation.

7.2.1 The ANF supports the proposal on the basis that prior to referral the board or committee has afforded the registrant an opportunity to respond to the allegations.

7.2.2 The ANF supports the proposal. However, again the ANF is of the view that prior to any decision being made by the board or committee to exercise the powers in this proposal, the board or committee must advise the registrant of the proposed decision and allow the registrant to make submissions in relation to the proposed decision.

7.3 Health assessments

7.3.1 The ANF supports the proposal but would add that ***the assessor must be a specialist in the area relevant to the registrants alleged health impairment.***

7.3.2 The ANF supports in principle but believes that 7 days is insufficient and suggests that 14 days is more reasonable.

7.3.3 The ANF supports the proposal.

7.3.4 The ANF supports the proposal.

7.4 Health panel hearings

7.4.1 The ANF supports the proposal however remains concerned regarding the composition of the panel, see comments at 6.4.1.

7.5 Decisions available to a health panel following a hearing

7.5.1 The ANF supports the proposal however we believe to require a practitioner to give an undertaking to the board essentially equates to placement of conditions on the practitioners registration, we therefore recommend changing require to **request** the practitioner to give an undertaking to the board.

- 7.5.2 The ANF agrees in principle. However, the legislation needs to be clear that the scope of the panel remains focused on health matters not wider performance or conduct issues.
- 7.5.3 The ANF does not support the proposal, as we see no reason for the notifier to be given reasons for the decision.

8. Conduct matters

- 8.1.1 The ANF supports the proposal.
- 8.2.2 The ANF supports the proposal.

8.3 Investigations

- 8.3.2 The ANF supports the proposal with the following amendment:
... and to proceed to refer a matter to a conduct management committee or tribunal without an investigation, in circumstances where the matter has been assessed and/or investigated in another jurisdiction and all the evidence is available, e.g. where the matter is as a result of a criminal conviction, admission of guilt by the practitioner, or referred by a health or performance panel.
- 8.3.3 The ANF supports the proposal with the additional amendments:
It is proposed that the legislation require the board to give notice of an investigation to the registrant, and that notice must:
- be in writing;
 - be provided to the practitioner within 28 days of the decision to conduct an investigation; and
 - provide the practitioner with the particulars of the allegation
- 8.3.4 The ANF cannot support a proposal that sanctions a board or an investigator not to give notice to a practitioner that an investigation is being carried out as it would be inconsistent with the principles of natural justice and procedural fairness to do so.
- 8.3.5 The ANF supports this proposal but would suggest legislated timeframes for conclusion of an investigation as such we recommend 3-6 months.

8.4 Powers to investigate – search, entry and seizure

8.4.1- 8.4.2

It is the view of the ANF that the powers proposed are, for most states, a major change and we hold serious concerns in relation to them.

Firstly, requiring the person to provide information and attend to answer questions or produce documents is a significant departure in most states from current arrangements. Presently nurses do not have to participate in an investigation interview if they choose not to. Furthermore it is a well established legal principle that a person should not be compelled to answer questions where to do so may potentially incriminate them. There is nothing in the proposal to indicate the common law right against self incrimination is preserved.

Quite often nurses and midwives are more comfortable with preparing detailed statements that respond directly to the allegations. The proposal seems to require nurses to attend and compels them to provide information and answer questions and if this is the case then the ANF strongly opposes this requirement as it has the potential to lead to a diminution of nurses' rights.

The power to compel a person to answer questions is one which is only legislated in the rarest of circumstances and is always highly controversial. In the view of the ANF, the legislation should not provide the board the power to compel registrants to answer questions. The investigators are not law enforcement or intelligence officers. To provide the board investigators with powers analogous to law enforcement officials dealing with terrorism or serious crime is not only grossly out of step with the views of the profession but also sends the wrong message as to the nature of professional misconduct.

Providing such powers to board investigators will be roundly condemned by the nursing and midwifery professions and may have a detrimental impact on retention of nursing professionals. A compulsion power has not been necessary in the nursing profession previously and there is a paucity of evidence to suggest that such a power will result in better outcomes from investigations into conduct issues in the future. In the view of the ANF such a proposal will be greeted with dismay and disappointment by the profession and will undermine support for the national scheme.

What is also not apparent in the proposal is what occurs in circumstances where a person refuses to answer questions of an investigator. Where such power has been granted to a person under enactment previously, this is addressed by way of making a refusal to co-operate an offence punishable by way of imprisonment and fine. The ANF cannot agree with a proposal

which criminalises a basic human right such as the right to silence. It is arguable this proposal evidences an unfortunate continuation in the diminution of basic civil rights of Australians apparent in such legislative regimes introduced in recent years as the Building and Construction Industry Improvement Act 2005. It is trite to note that coercive powers given to the Australian Building and Construction Industry Improvement Act have been highly controversial and largely repudiated by the current government while in opposition and the legal fraternity.

The proposal to give investigators the power to compel attendance and answers has the potential to overshadow what is, in the ANF's view, essential legislation for the relevant professions.

Furthermore, the search and entry powers are also a major change and are problematic. Such powers would be that akin to police powers. The ANF is of the view that these powers would send the wrong message to nurses in relation to professional conduct matters which have always been regarded by the board as having the purpose of protecting the public as opposed to being criminal in nature. In addition the purposes of professional conduct boards and tribunals have similarly been seen as protective rather than punitive.

More problematic however, is the proposal at 8.4.2 that empowers investigators or other persons authorised by the board to obtain and execute a warrant to enter and search premises and seize documents and other items. Such premises are not limited and may include residential premises. A proposal of this nature moves investigations into what is a criminal investigation arena, a move that currently is not the case in nursing or midwifery and one which the ANF strongly rejects as being too heavy handed, completely unnecessary and if implemented again in our estimation will seriously undermine the national scheme.

8.5 Conduct panel hearings

- 8.5.1 The ANF supports this proposal but continues to make the point that the panel must be constituted with odd numbers in order for it to function appropriately. See 6.4.1 for more information regarding the matter.

8.6 Decisions available to a conduct panel following hearing

- 8.6.1 The ANF supports the proposal but suggests the power in relation to undertakings that the panel can request of a practitioner to enter into an undertaking.
- 8.6.2 The ANF rejects the proposal for the reasons previously expressed.

- 8.6.3 The ANF supports the proposal to provide reasons to the practitioner but not the complainant.

9. Ensuring accountability, transparency and procedural fairness

- 9.1.1 The ANF supports option 2.

- 9.1.2 The ANF supports the terminology protection of the health and safety of the public.

- 9.2.1 The ANF supports this proposal provided the sharing of resources relates only to investigation/administrative resources and decision making remains with the specific professional Board.

9.3 Legal representation for registrants at panel hearings

It is the position of the ANF that a registrant must be entitled to representation by a person of their choosing at any stage of the investigation/conciliation/hearing process. The proceedings have the potential to affect the rights and interests of registrants and as such procedural fairness and natural justice require they have full entitlement to representation. The representative whether legal or not must be entitled to make submission and represent the registrant in accordance with their instructions. The legislation should expressly acknowledge the rights of a registrant to be represented by an agent or their professional or trade union.

In the ANF's view, the possibility that legal representation at a panel hearing may increase the level of formality and technicality of such proceedings is an assumption which is not based on empirical evidence. In our view the presence of legal or union representation may have the reverse effect. It may also mean that appeals from a decision of a panel are less likely if all matters that should have been raised are raised and the panel complies with the rules of procedural fairness.

In the ANF's view the ability of registrants to be represented by a legal representative agent or trade union would also instil greater public confidence into a panel system. It is also arguable that competent representation will reduce the likelihood of appealable error.

9.4 Confidentiality of panel hearings

The ANF supports option 1, that panel hearings should be closed to the public.

- 9.4.1 The ANF does not agree the complainant should be afforded an automatic right to make submission if not called as a witness. Matters properly brought before any decision-maker are those matters that are relevant to

proceedings. If material from an individual is relevant, they may be called as a witness. This proposal is inconsistent with the principles of procedural fairness and natural justice.

- 9.5.1 The ANF does not support the first sentence, however, the second sentence is supported.

9.6 Review rights of registrants

- 9.6.1 The ANF is of the view that review should be by way of rehearing on the material already before the panel. In addition it is the view of the ANF that a tribunal should be able to conduct a de novo in relation to a matter heard.

9.7 Notice of decisions of hearing panels

- 9.7.1 The ANF supports the proposal only if the reason for decision is not included. The decision should be in writing and the written decision should be made available to relevant persons within 14 days of it being delivered.

9.8 Role of Commonwealth, state and territory Ombudsman

The ANF supports option 1.

10. Tribunal hearings

- 10.2.1 The ANF supports the proposal.
- 10.2.2 The ANF supports the proposal however there is a significant typographical error; panel should read tribunal.
- 10.3.1 The ANF supports the proposal.
- 10.4.1 The ANF supports the proposal.
- 10.4.2 The ANF supports the proposal excluding the point cancellation of registration because the practitioner is no longer eligible for registration.
- 10.5.1 The ANF supports the proposal with the following amendment:
...the practitioner's performance has been unsatisfactory **to a sufficiently serious degree**...practitioners capacity to practice is affected **to a sufficiently serious degree, by impairment due to alcohol or other drug abuse or mental or physical illness.**
- 10.5.2 The ANF supports the proposal with deletion of ...'impose a fine on the practitioner recoverable by the board'.
- 10.5.3 The ANF supports the proposal.

- 10.5.4 The ANF supports the proposal.
- 10.5.5 The ANF does not support the proposal.
- 10.6.1 The ANF supports the proposal.
- 10.8.1 The ANF supports the proposal.
- 10.9.1 The ANF supports the proposal so long as the legislation does not allow the tribunal to issue a prohibition order automatically at the time it cancels registration of a practitioner.
- 10.10.1 The ANF supports the proposal.
- 10.11.1 The ANF supports the proposal.
- 10.12.1 The ANF supports the proposal with an inclusion that the public record states 'conditions apply' against a health practitioner with conditions imposed.

11. Offences and regulated conduct

- 11. 1 The ANF has previously expressed concern regarding obtaining Professional Indemnity Insurance (PII). Again, we raise the matter in relation to the proposal. The concern centres initially on applicants who are not yet employed or independent midwives who are unable to obtain PII. If PII is mandated in legislation, governments must ensure there are appropriate schemes accessible for all health professionals to access or provide exemptions where necessary.
- 11.3.1 The ANF supports the proposal.
- 11.5.1 The ANF supports the proposal.
- 11.6.1 The ANF supports option 3.
- 11.7.1 The ANF supports the proposal noting however its objection to the proposed power to direct a person to attend and answer questions. The ANF strongly opposes such coercive powers being in legislation. The ANF does not think the investigator should be provided with the ability to make a lawful direction of this nature.
- 11.8.1 The ANF supports the proposal.
- 11.8.2 The ANF supports the proposal.

11.8.3 The ANF supports the proposal.

11.9.1 The ANF supports the proposal.

11.10.1 The ANF supports the proposal.

12. Transition Arrangements

12.1 The ANF supports the proposal with the following addition:

Boards should have the power to complete all matters that originated under the repealed legislation. However, only notifications received before 1 July 2010 should be managed under the repealed legislation. Notifications received after 1 July 2010 must be managed under the national scheme by boards irrespective of when the conduct occurred.