THE UNION FOR QNU NURSES AND MIDWIVES
QUEENSLAND NURSES' UNION

Health Ombudsman Bill 2013

Submission to the Health and Community Services Committee

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Introduction

The Queensland Nurses' Union (QNU) thanks the Health and Community Services Committee (the Committee) for providing the opportunity to comment on the *Health Ombudsman Bill 2013* (the Bill). In establishing a Health Ombudsman to deal with complaints and other matters relating to the health, conduct or performance of health practitioners, registered and unregistered, the Bill will have significant effect on all of our members.

The QNU represents all categories of workers that make up the nursing workforce in Queensland including registered nurses, registered midwives, enrolled nurses and assistants in nursing who are employed in the public, private and not-for-profit health sectors including aged care. The QNU also retains specialist lawyers to assist its members in their dealings with the Nursing and Midwifery Board of Australia (NMBA) and Australian Health Practitioner Regulation Agency (AHPRA).

Our more than 50,000 financial members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNU and our membership continues to grow.

The QNU supports an effective and efficient health complaints system that provides for protection of the community, and fairness to health practitioners. The QNU considers that while there are a number of positive features to the Bill, there are also aspects of concern, which will be outlined below.

Potential Beneficial Outcomes from the Bill

The QNU believes that the Bill may provide some benefits to health practitioners and the public *vis*:

Timely decision-making

The QNU acknowledges that there have been problems with timeliness of action and decisions from AHPRA and the National Board with which QNU members are involved, the NMBA. The QNU also notes the problems with timeliness of decisions from the Medical Board of Australia (MBA), as outlined in Dr Forrester's report.

The QNU notes however that the national approach to registration, accreditation and discipline of health practitioners has been a great advance for health practitioners and

the public in Australia, when compared with the previous inconsistent state-based schemes. Since its commencement, AHPRA processes and timeframes have generally improved, though there is room for further improvement.

There is a focus on timeframes in the Bill, many of which are quite short. When serious concerns are raised in relation to health practitioners, it is important that they be considered promptly, and action taken if required. However, care must be taken to ensure that health practitioners are given an appropriate opportunity to respond to concerns, and that action is only taken when it is necessary to do so. We will comment further below in relation to our concerns with some of the short timeframes proposed in the Bill.

Mandatory reporting

We welcome the amendment of s 141 of the *Health Practitioner National Law Act 2009* (National Law) by Part 23 of the Bill. This amendment clarifies that s 141(2) of the National Law does not apply in relation to a second health practitioner's notifiable conduct if the first health practitioner -

(a) forms the reasonable belief as a result of providing a health service to the second health practitioner; and
(b) reasonably believes that the notifiable conduct—
    (i) relates to an impairment which will not place the public at substantial risk of harm; and
    (ii) is not professional misconduct.

In our experience, treating practitioners often make 'mandatory notifications' to AHPRA about other health practitioners when this is not truly required (for example, when the practitioner patient has insight into their health condition and they are appropriately treated, or when the practitioner is on leave from work until their health issues are appropriately treated).

The requirement for treating practitioners to make reports about their health practitioner patients deters practitioners from seeking treatment when required for fear that their doctor or other practitioner will make a report to AHPRA about them. Practitioners should feel able to seek treatment as and when required – this benefits both the practitioner and the public.

While the amendment arguably simply clarifies the current position under the National Law, the amendment is welcome, as it will make it clearer to treating practitioners that a mandatory report is not required when their health practitioner patients are not placing the pubic at risk.

Greater regulation of unregistered health practitioners

For some years the QNU and our federal body, the Australian Nursing Federation (ANF) have been campaigning for the regulation of Assistants in Nursing (AINs) (however titled).

While we accept that unregulated nursing and personal carers may be competent at providing a basic range of services and are valued members of the team providing care to consumers, these staff may not be able to recognise more serious issues that require intervention, supervision and support from registered nurses.

The QNU has consistently argued that anyone undertaking nursing should be designated as a nurse and operate within a regulated framework. Where care and support includes nursing, then a nurse should undertake this work whether it is in the home or a facility. This will require consistent transparent criteria on the nature of nursing in order to make a judgment.

The QNU contends that the NMBA as the regulating body for registered nurses, enrolled nurses and midwives should also regulate AINs. Through a registration regime, AINs would require a minimum level of formal education and accountability in their practice. Competency standards for AINs, when developed, should be based on those currently governing the regulated nursing workforce.

The QNU notes that the Bill does not provide a full registration scheme for AINs and other similar unregulated workers, but supports moves towards greater accountability and professional oversight of all persons providing healthcare services to the community. Whilst greater accountability and oversight of unregulated healthcare workers is a positive step in protecting the public from harm, and is supported by the QNU, it is difficult to envisage how the Health Ombudsman will be able to measure the standards of care provided by unregulated healthcare workers when there are no universally accepted and regulated standards to apply as a reference point in an investigation or adjudication of a specific complaint. It is also unfair to expect unregulated healthcare workers to be called to account when professional standards and relevant competencies that apply specifically to this type of healthcare worker do not exist.

The QNU urges the Queensland Parliament to consider the enactment of a regulatory framework where unregulated healthcare workers (however titled), who assist registered and enrolled nurses in the provision of care, have clearly defined education standards and skill competencies which encapsulate relevant nursing professional standards and accountability in the provision of healthcare and particularly nursing care.

Reprisal Action

The QNU notes that protection from reprisal action for individuals making a complaint to a regulatory body is currently quite limited, particularly for members in the private sector.

The QNU welcomes the provisions under s 261 of the Bill that make reprisal action against a person making a complaint or providing information an offence, for which civil action may also be taken (ss 262, 263).

Areas of Concern

While we note that there may be some beneficial outcomes from the Bill, we also point to some areas that we feel need further attention, *viz*:

Balancing protection of the public with fairness to practitioners

As noted above, the QNU supports an effective and efficient health complaints system that provides for protection of the public, and fairness to health practitioners.

The QNU notes the Objects of the Bill, and the paramount guiding principle that "the health and safety of the public are paramount". The QNU agrees that public health and safety are of course of utmost importance, but submits that this must be balanced with the need to ensure fairness to health practitioners.

We submit that the Objects and guiding principles should include a requirement that the Ombudsman act in a transparent, accountable, efficient, effective and fair way, and that restrictions on the practice of a practitioner are to be imposed only if it is necessary to ensure that health services are provided safely and are of an appropriate quality. These provisions are similar to those contained in the National Law.

Short timeframes

The short timeframes contained in the Bill are likely to adversely impact on practitioners' ability to obtain assistance and make considered responses to complaints made against them. No extensions of time for practitioners will be permitted in most cases.

The QNU is concerned that a focus on faster processes and decisions could result in one or both of the following:

- increased registration fees for practitioners; and/or
- abrogation of natural justice and procedural fairness for practitioners.

Quicker processes, investigations and decisions will require a large staff for the Health Ombudsman's office, and we assume that as the scheme is apparently to be 'cost-neutral for government'[1] it will be largely or entirely funded by registrant fees. The QNU is therefore concerned about increases in registration fees for practitioners.

When complaints or notifications are made against practitioners, it is important that they are given a fair opportunity to respond to the issues raised against them. Regulatory schemes must be fair to practitioners, as well as protecting the public, by ensuring that natural justice is afforded to practitioners in responding to notifications made against them. The QNU is concerned that a focus solely on quick processes and decision-making may not afford practitioners the opportunity to make considered responses to complaints made against them. Properly advised and considered responses benefit both the practitioner and regulators in promptly and fairly dealing with matters.

The QNU is also concerned about the strictness of the timeframes proposed in the Bill. For example, s 47 of the Bill provides that if the Ombudsman is assessing a matter, the period for a practitioner to provide a submission "must not be more than 14 days after the notice is given". This is a very short period of time within which practitioners may seek and obtain advice and representation in relation to the matter, seek and obtain relevant supporting or evidentiary material, and provide a considered response to the complaint made against them.

Obtaining an expert report, or a treating practitioner report, for example, would likely take well in excess of the 14 days permitted. Where there are concerns in relation to a practitioner's competence or skill, the view of an expert or supervisor, for example, would meaningfully assist the Ombudsman in their consideration of the matter. Similarly, where the concern is that a practitioner may have an impairment, a treating practitioner's report would obviously be relevant. The provision of meaningful and relevant supporting or explanatory material benefits both practitioners and regulatory bodies in the prompt and fair resolution of matters. However, relevant material such as expert and treating practitioner reports, for example, can often be difficult to obtain within a short period of time.

[1] Health Ombudsman Bill 2013 Explanatory Notes, p 4.

There may also be other factors beyond the control of the practitioner which may require a longer time for response, and holiday periods, too, would also make many of the proposed timeframes in the Bill extremely short indeed. The traditional Christmas to New Year break is at least a week and often 10 days, which would make any short statutory timeframe impossible. We assume, as well, that timeframes for practitioners (eg the 14 days for a response to an invitation to provide submissions for the Ombudsman's assessment) will be taken to be from the date the practitioner receives the notice from the Ombudsman, rather than the date the Ombudsman sends the notice to the practitioner. Any other interpretation would be unfair, in our view.

The QNU submits that the Ombudsman's office should be empowered to permit extensions to the statutory timeframes in appropriate circumstances, and that this would benefit both the Ombudsman and practitioners and help to ensure that fair and reasonable decisions are made after receipt of relevant material and considered responses.

Immediate Action

The QNU also has concerns in relation to the ability of the Health Ombudsman to deny a practitioner natural justice by taking immediate action before seeking a response from the practitioner.

Under Part 7 of the Bill, the Health Ombudsman need not seek a response from a practitioner before taking immediate action in relation to a registered practitioner (eg suspending their registration) or issuing an interim prohibition order in relation to an unregistered practitioner.

The QNU acknowledges the need, in appropriate cases, for regulators to be able to take prompt action in relation to health practitioners. The National Law currently requires National Boards to give practitioners an opportunity to provide written or verbal submissions in response to the proposed immediate action. The time given for a response is often very short (often just a few days, but in practice could be very short indeed – e.g. an hour). If no response is received, the National Board can simply take the action. The QNU is not aware of evidence of any adverse impacts flowing from seeking a response from a practitioner to a proposed immediate action.

The QNU questions the necessity a power permitting immediate action to be taken without first seeking any response at all from the practitioner.

The QNU is aware of a number of proposed immediate action matters under the current law where the allegations appeared serious at first reading, but the practitioner's response satisfactorily explained the matter, such that immediate action was not required

after all. In one case, the NMBA had proposed to take immediate action to suspend a practitioner's registration after receiving a notification about the practitioner's personal health. Following a submission made on behalf of the practitioner, the NMBA was then able to appreciate that the practitioner was receiving appropriate treatment in relation to their health, and that the practitioner's health was not affecting their nursing practice. The NMBA appropriately determined to take no further action and closed the matter. Had the practitioner not had the opportunity to respond, their registration would have been suspended unnecessarily and unfairly, and likely for a protracted period of time.

The QNU is also aware of another matter where the NMBA proposed to take immediate action in relation to a mental health nurse. The proposed immediate action was a condition prohibiting the nurse from working in mental health. This would have made the nurse unemployable, given that their whole working life had been spent in mental health nursing. Following a submission made on behalf of the practitioner, the immediate action was not taken after all, although the matter was referred for appropriate investigation.

Immediate action can have very harsh consequences for practitioners, depriving them of their ability to earn an income. The immediate action taken (eg suspension of registration) may also have effect for an extended period of time while an investigation is conducted. Their employment may be terminated because of the suspension of their registration, and a practitioner may not be able to work at all in their profession during that time. The effect of a suspension also flows onto the practitioner's family and their personal life, including their ability to maintain financial responsibilities. It is very important therefore, that practitioners have a chance to respond to allegations made against them before action is taken, and the matter is then dealt with expeditiously.

Affording practitioners an opportunity to respond *after* immediate action is taken is simply not a substitute for allowing practitioners an opportunity to respond before action is taken. We expect that, unfairly, a decision once made will be difficult for the practitioner to displace, and that the onus of proof will likely be in effect reversed, with the onus on the practitioner to disprove the need for the action to be taken.

The QNU submits that the immediate action provisions should require that a practitioner be afforded an opportunity to respond *before* action is taken in relation to their registration.

Failing this, we submit that the show cause process after taking action (s 61) should make it clear that the Ombudsman must reassess the matter afresh pursuant to the test in s 58, namely, considering whether there is sufficient basis to reasonably believe that because

of the practitioner's health conduct or performance they pose a serious risk to persons, and it is necessary to take the action to protect public health or safety.

The QNU submits that if the immediate action powers are to continue to permit action to be taken without first seeking a response from the practitioner, that power should not be used except in the most urgent and serious circumstances, and where there is strong and substantiated evidence of serious risk to the public, and evidence that seeking a response from the practitioner would result in serious risk to persons.

The QNU is also very concerned that immediate action decisions may be published by the Ombudsman (s 273). This is particularly concerning, considering, as outlined above, immediate action can be taken before a practitioner has had an opportunity to respond to the complaint made against them. If immediate action is taken against a practitioner, this will be noted against their registration on the AHPRA website. We submit that full publication of the immediate action decision is not required and unfair, particularly considering the practitioner may not yet have had an opportunity to respond to the complaint made against them.

Natural justice and appeals

As outlined above, the QNU is very concerned that the Bill as it stands at present has the effect of abrogating natural justice and unfairly shortcutting procedural fairness for practitioners, and enables potentially unfair decisions.

Poor decisions will lead to more appeals. We are also very concerned by s 100 of the Bill which provides that the Queensland Civil and Administrative Tribunal (QCAT) is not permitted to grant a stay of a decision to take immediate action or issue an interim prohibition order. This means that to overturn unfair decisions, practitioners will likely need to apply to the Supreme Court for a stay in appropriate cases. This will be unnecessarily expensive for both practitioners and for the Government. We note, as well, that if decisions on appeal are found to be made without a proper basis, legal costs may be awarded against the Ombudsman. Presuming that the Ombudsman will be self-funded by registrant fees, these costs will then ultimately borne by all registered health practitioners.

QCAT does have the power to review decisions, including decisions to take immediate action and interim prohibition orders. However, QCAT workload is currently such that any appeal lodged generally takes at least 6 months to come to hearing. This is an unacceptable time for a practitioner to wait to have an unfair decision overturned.

QCAT should be empowered to grant stays of decisions to take immediate action and issue interim prohibition orders, in accordance with established legal criteria for stay applications, and QCAT should be appropriately resourced to deal with matters promptly.

In summary, quick decisions can be very poor decisions, especially when they do not seek a response from the practitioner before the decision is made. Overturning such decisions will be time consuming and costly, both for individual practitioners and the Ombudsman. Removing natural justice obligations will likely lead to very harsh and manifestly unfair results for health practitioners.

In the QNU's experience, many notifications are misconceived or lacking in substance. Some are vexatious. Many matters have already been dealt with in other ways. Some employers use notifications as a way to make the regulator manage their employees for them, when this is not the regulator's role.

An ultimate decision of 'no further action' in relation to a notification does not mean that there has been a failure on the part of a regulator, or that a bad decision has been made. The role of regulators is not to punish practitioners. While regulators have an important role in protecting the public, they must also be fair to practitioners and provided natural justice.

Release of copy of complaints

The QNU submits that practitioners' ability to respond in a considered and meaningful way, within a short timeframe, would be enhanced by practitioners being provided with a full copy of the complaint made against them as a matter of course. This usually occurs now with AHPRA notification matters, but in circumstances where it does not, this leads to unnecessary delays.

We submit that the Bill should provide that when a complaint is made against a practitioner, a full copy of that complaint is provided to the practitioner for response, except in the very limited circumstances where release of the complaint to the practitioner would likely prejudice an investigation of the matter, or where release would place a person's health or safety at risk.

Removal of privilege against self-incrimination

The QNU is concerned by the removal of the privilege against self-incrimination in sections 162 (3) and 164 (3) of the Bill in relation to inquiries undertaken by the Ombudsman.

The privilege against self-incrimination is a fundamental protection, that should not be removed without strong and compelling circumstances.

Processes, tests and criteria for action

It seems that there are many possible pathways for action set out in the Bill. It is unclear at this stage how this will work in practice and which processes will be used for which types of matters. The lack of clarity is arguably compounded by the fact that little statutory guidance seems to be given to the Ombudsman regarding the tests or criteria to consider before acting in a particular way, or following a particular process. This would benefit from greater statutory clarification, in our view.

We note that s 14 of the Bill sets out the ways in which the Ombudsman may deal with complaints and other matters. However, the criteria to be used by the Ombudsman to decide what kind of action to take are largely unspecified (except for immediate action matters). The sections specifying functions and general powers of the Ombudsman (ss 25, 26, 27) do not shed significant light on the criteria that should be used when making decisions regarding appropriately dealing with complaints.

Similarly, specific sections of the Bill relating to the Ombudsman's consideration of complaints and the ability to take certain actions do not specify statutory tests to be used by the Ombudsman to decide whether or not certain action is appropriate. For example, s 35 of the Bill relates to initial assessment of complaints, and allows the Ombudsman to accept the complaint, or take no further action. No criteria or test is specified for how the Ombudsman is to decide whether or not any further action is required. Section 46 relates to assessment of complaints, and refers to "analysing" and "considering" information, but seems to provide no criteria for that analysis or consideration. The decision to investigate, too, in s 80 seems to be made without test or criteria being specified.

By comparison, the National Law requires that a National Board "reasonably believes" certain matters before taking action – for example, s 178 of the National Law requires that a National Board reasonably believes that "the way a registered health practitioner … practises the profession, or the practitioner's professional conduct, is or may be unsatisfactory", or reasonably believes that the health practitioner has an impairment. In our view, these sorts of threshold statutory questions would greatly assist the Ombudsman in properly considering in whether or not certain action is required, and how matters are to be dealt with. As it stands at present, the Ombudsman's powers are largely unstructured and unguided in many respects with regard to how to deal with complaints.

While s 44 sets out criteria for when no further action may be taken, this is no substitute, in our view, for specifying with more particularity the factors to be considered by the Ombudsman when deciding when action is required, and what action should be taken.

The Bill as it is currently drafted will lead to confusion as well as poor and inconsistent processes, referral and decision-making, in our view. We noted that these are some of the same problems the Forrester report criticised in relation to the Medical Board.

The Bill should provide clear statutory criteria for when certain actions are required – for example, a requirement that the Ombudsman reasonably believe that the way a practitioner has practiced their profession, or their professional conduct, is unsatisfactory. This would add much needed clarity and structure to the Bill and to the Ombudsman's powers and functions, in our view.

Investigation reports

The QNU is concerned by the suggestion that investigation reports fully identifying individual health practitioners and including confidential information may be made "publicly available" (s 87). "Publicly available" does not seem to be defined in the Bill, but we presume it means investigation reports may potentially released to the public at large.

The QNU is very concerned that publication of investigation reports fully identifying practitioners and including confidential information would be an unjustified intrusion into practitioners' privacy. Investigations could be about many different kinds of matters, including matters where practitioners have an impairment. There seems to be no real restriction on the type of information about a practitioner that can be included in an investigation report and published. Potentially very private and personal information about practitioners could be included in investigation reports, and an opportunity to respond to adverse comments (s 86(3)) does not address this concern.

Information about practitioners' personal health and circumstances may potentially be published on the internet indefinitely. It is not difficult to imagine the very severe adverse effects this could have on practitioners and their families. The QNU is aware of a matter where a practitioner was suicidal because of very personal and private information published about her on the internet relating to her nursing registration.

An investigation, too, is an interim step in the process. The Ombudsman may, after considering the investigation report, determine that no further action is required. Yet,

the Bill would allow the investigation report to be published. This is unjustified, in our view.

If the matter is serious enough to warrant action being taken against the practitioner's registration (eg suspension, imposition of conditions), the action will be noted on AHPRA's online register. There is no need, we submit, for the investigation report to be published. If the Ombudsman wishes to demonstrate that action is being taken in particular types of matters, investigation reports could be published in a de-identified way.

The provisions of the Bill allowing publication of investigation reports permit an unjustified intrusion into practitioners' privacy, in our view, and should be removed.

The QNU is also concerned about sections of the Bill permitting the Ombudsman to provide information to employers about matters where no determination has yet been made against the practitioner (eg ss 279, 282). This could lead to employers holding unjustified concerns in relation to their staff where allegations against the practitioner remain unproven, and could lead to serious consequences such as suspension or termination of the practitioner's employment.

Cost

As noted above, the QNU is concerned by the potential costs required to properly staff and operate the Office of the Health Ombudsman, and whether this will lead to increased registration fees for registered health practitioners.

The Explanatory Notes state that regulating unregistered practitioners "will only incur modest additional costs". [2] The number of unregistered practitioners is likely to be very large indeed, encompassing all sorts of different practitioners (eg AINs, personal care workers, doulas, ambulance officers, counsellors, audiologists, alternative and complementary therapists, massage therapists, spiritual healers, etc) – none of whom will be paying any registration fees. We suspect that Government would not be able to reliably estimate how many individuals and organisations will be covered by the Health Ombudsman legislation, and what kind of workload will be involved for the Office of the Ombudsman in regulating unregistered practitioners. We are concerned that this cost could be quite substantial. We are concerned too that the fees of registered practitioners may be used to cross-subsidise the regulation of unregistered practitioners.

We understand that the somewhat similar Health Care Complaints Commission (HCCC) in New South Wales relies partly on Government expenditure, rather than simply on

[2] Health Ombudsman Bill 2013 Explanatory Notes, p 4.

registrants' fees. The HCCC, too, has functions in relation to unregistered practitioners who do not pay registration fees. While the abolition of the HQCC by the Bill may lead to that budgeted expenditure being redirected to the new Health Ombudsman, we question where ongoing funding will be sourced, especially considering that the scheme is said to be 'cost neutral' for Government.

Section 19 of the Bill inserts a new provision in the National Law, as it is to apply in Queensland, relating to the transfer of some fees payable by Queensland health practitioners to the Health Ombudsman. The fees to be transferred are to reflect the reasonable cost of the Health Ombudsman performing functions related to the health, performance and conduct of health practitioners that would have been performed by the national boards and the National Agency had the *Health Ombudsman Act 2013* not commenced (Explanatory Notes, p. 41). For this purpose, the Minister, in consultation with the Ministerial Council, the national boards and the National Agency, must decide, for each profession, the amount of registration fees payable by Queensland health practitioners that should be transferred to the Health Ombudsman.

Thus although the Explanatory Notes claim that the new scheme will be 'cost neutral for government' we fail to see how this can occur without additional funding, particularly given the number of new unregistered practitioners and the commitment to short turnaround times for complaint matters. We assume that funding will also be split with AHPRA as it will retain some of its complaints functions.

We therefore make it clear that the QNU strongly opposes any moves to increase registration fees to fund the new scheme. Nurses and midwives are amongst the lowest paid of the registered health professions[3] and any increase in registration fees could have severe financial consequences for some of our members. Last year, our members responded angrily to the NMBA's decision to increase registration fees by 40%, particularly as this defied assurances that national registration would produce economies of scale to reduce costs and the NMBA provided no evidence to support the increase. 'Cost neutral for government' must not mean additional costs for registrants.

Conclusion

The QNU would welcome the opportunity to comment on any proposed legislative amendments to the health practitioner regulation scheme if the Committee decides to hold public hearings.

[3] Under the *Nurses' Award 2010 t*he entry rate for Medication Endorsed Enrolled Nurses is $19.65 per hour (factoring in transitional arrangements with respect to pay under Fair Work legislation).

References

Health Ombudsman Bill 2013 Explanatory Notes