

NZNO Legal Services Operational Policy

Introduction

This policy describes the legal services NZNO offers to members and the circumstances in which that occurs.

Please refer to the NZNO LCA (Lawyers and Conveyancers Act) Policy, which covers the obligations on lawyers, including in conflicts of interest situations. That policy specifies that in-house lawyers may only provide legal services to NZNO itself, or to members where the services are relevant to the member's NZNO membership.

NZNO legal services are provided to members free of charge, although we require that the member maintains their membership during the course of the proceeding (see LCA Policy). NZNO lawyers cannot undertake representation of non-members, although a charge can be made for lawyers' involvement in activities such as public speaking (see policy).

Indemnity Cases

Reference should be made to the current indemnity insurance policy to determine which matters are covered by the policy, and what the exclusions are.

The NZNO professional liability insurance policy provides cover for nurses, midwives, health care assistants and other occupational groups covered by the membership clause in the NZNO Constitution (Schedule One, clause 1). It covers members for an "act, error or omissions in the conduct of the Insured's profession".

The indemnity insurance policy also specifically provides for the payment of the costs of the investigation, defence and settlement of the following proceedings (inter alia):

- Investigations or proceedings under the Health Practitioners Competence Assurance Act 2003 (HPCAA);
- Health and Disability Commissioner investigations;
- Coroner's inquests;
- Privacy Act investigations;
- Human Rights Review Tribunal proceedings;
- Criminal actions relating to negligence or standards of care; and
- Criminal prosecutions relating to the carrying out of professional duties.

Cover for most matters is currently \$500,000 per incident or \$1,000,000 per year per member. The exception is criminal defence costs, which are currently limited to \$200,000, and cover is lost if a judgment or final adjudication establishes that criminal conduct did occur.

The indemnity insurance policy covers the provision of legal representation and the payment of costs incurred in defending the case (including our disbursements and costs or fines awarded against the member).

A person must be a member at the time of the incident to be covered by the indemnity insurance policy. This may need to be closely examined in some cases, particularly where there are multiple incidents or conduct alleged to have occurred over a period of time. In the event that one or more incidents involved in a complaint or case occurred

when the person was an NZNO member, and others did not, this will need to be discussed with the insurer. As representation has to be provided for events occurring during membership, and split representation may well not be feasible, a decision may be made to provide representation for all events, but with the member required to contribute to whatever share of any costs or costs award that can legitimately be linked to the non-covered event/s. These matters should be discussed with the member and put in writing to them at the start of representation.

Prompt notification to the insurers of the existence of cases is required and significant decisions (such as briefing out, obtaining expert evidence and pleading guilty) should be discussed with them. The insurers should be informed of major developments in a case (such as when a Professional Conduct Committee refers a matter to the Health Practitioners Disciplinary Tribunal).

Under the indemnity insurance policy, members whose conduct is in question are entitled to representation. However, if there is a disagreement between the insurers and the member about whether to contest legal proceedings, then the opinion of legal counsel shall be sought (see indemnity insurance policy). The most common situation where this arises is if the member wishes to appeal a decision of the regulatory authority or the Health Practitioners Disciplinary Tribunal, and the NZNO lawyer does not consider such an appeal has a worthwhile prospect of success. The opinion of an external lawyer is then sought regarding the prospects of success of the appeal.

NZNO would usually support the application by a member for a review of a delegated decision within a regulatory authority under clause 18, Schedule 3 of the HPCAA. With appeals to the courts, consideration of the likelihood of success is required.

Other medico-legal cases or issues

NZNO will offer representation for other types of cases which arise at the Nursing Council or other relevant regulatory authority. These matters may not be covered by the indemnity insurance policy. This includes issues with members gaining registration (including students, and/or those with criminal convictions), Health Committee issues, and re-registration applications (after previous cancellation of registration).

For cases which are not covered by the indemnity insurance policy, NZNO retains a discretion as to the extent it will provide such services, particularly as regards payment for external services and appeals.

Competency issues with regulatory authorities are primarily dealt with by an NZNO competency adviser, but an NZNO lawyer will usually have input into cases where a member has been notified of possible suspension from practice (sections 39 and 43 of the HPCAA). This can be on an interim (pre-review) basis or as the consequence of a review.

NZNO lawyers may offer advice on health law issues to members, taking into account the lawyers' own expertise and time constraints.

Members as witnesses

Members are called to give evidence at a wide variety of court cases, which are not primarily about their professional conduct, but where issues about their conduct have the potential to arise. This includes cases concerning patients and their families' activities.

Where NZNO members are called as witnesses in such cases we will offer advice on their statement/brief of evidence and the nature of court processes, to the extent such advice is possible by NZNO lawyers who are not directly involved in the case. Representation will not be provided.

Employment

NZNO may take cases for members within the employment jurisdiction. The respective roles of organisers, industrial advisers and NZNO lawyers in employment cases are outlined in the *Organiser's Manual*.

Generally, personal cases with some merits will be taken to mediation by the organiser. If the mediation is unsuccessful the lawyer then assesses whether to proceed further with the case.

Under the NZNO Constitution (and the predecessor Rules). NZNO retains a discretion as to:

“... whether and to what extent it will pursue personal grievance cases and other disputes”. (Schedule 1, clause 9.1.4.1)

Usually this decision will be made following consultation between the NZNO lawyer and other staff, including the organiser, industrial advisers or service managers.

Consideration will be given to whether the case has a reasonable chance of success and/or meaningful remedy and to whether the litigation could have a negative impact on the wider interests of NZNO and its members.

ACC claims by members

NZNO will offer legal representation to members undergoing ACC reviews for established or alleged workplace injuries, but only to the completion of the review. Representation will not be offered for:

- District Court, or subsequent, appeals from reviews; or
- ACC claims where the member accepts the accident was not work related. NZNO may still offer support for workplace issues arising from such an injury.

Decision not to offer representation

Where a member is seeking representation in a situation where NZNO has discretion, if the decision is not to provide representation, the member should be advised of this in writing. They should be informed of their ability to seek representation elsewhere at their own cost, and the existence of any impending time limits within which their claim must be pursued.

Travel

NZNO will pay for the costs of the member to attend a mediation or hearing, where NZNO is representing the member. NZNO reserves the right to decide on the method of travel for the member. Bookings will usually be done through NZNO.

Members will be expected to make their own travel arrangements within their home town or city. This includes getting to the local airport to fly to a hearing. In exceptional circumstances, NZNO will consider offering assistance for such travel. NZNO will pay for parking costs incurred while the member attends a hearing.

NZNO will assist with travel within another town or city, where a hearing is being held. It will also reimburse for reasonable costs for members' meals, in accordance with the NZNO Travel Policy.

Disbursements

NZNO will pay for obtaining expert advice for litigation purposes, where the NZNO lawyer considers that such advice should be obtained.

NZNO will pay for second opinions (from a doctor etc) where the NZNO lawyer recommends the obtaining of such a report, taking into account the member's views on the issue. This covers medical opinions obtained for the purposes of ACC reviews and Nursing Council Health Committee cases.

Where possible and without harming the member's interests, reimbursement will be sought for the cost of obtaining such opinions through the costs process.

Briefing out / external lawyers' fees

Most of the legal representation of members is undertaken by the NZNO lawyers. However, on occasions it may be necessary to brief outside lawyers to undertake this work. This includes where there is a conflict of interest between members, where the case or court is outside the expertise of NZNO lawyers, or for workload reasons.

In this event, NZNO decides which lawyer to brief, considering the member's view (if any). The indemnity insurers should approve the external lawyers which indemnity cases are briefed to.

For cases where NZNO has briefed external lawyers, NZNO (or the indemnity insurers) are responsible for the payment of those lawyers' bills.

NZNO is not obliged to, and will generally not, accept responsibility for the bills of external lawyers where the member has sought the involvement of that lawyer directly. Where an NZNO lawyer or staff member is aware a member is going to seek external legal advice, they should be advised that they will bear the cost of this.

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Principal author: NZNO Legal Team

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Correspondence to: nurses@nzno.org.nz

Mission statement

NZNO is committed to the representation of members and the promotion of nursing and midwifery. NZNO embraces Te Tiriti o Waitangi and works to improve the health status of all peoples of Aotearoa/ New Zealand through participation in health and social policy development.

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