



Response to 'Proposed by-law amendment requiring members to obtain professional liability insurance'

Submission to the College of Nurses of Ontario

by

The Registered Nurses' Association of Ontario (RNAO)

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RNAO's Submission to the College of Nurses of Ontario Regarding: 'Proposed by-law amendment requiring members to obtain professional liability insurance'

Introduction:

The Registration Nurses' Association of Ontario (RNAO) is the professional association representing registered nurses (RNs) working in all roles and sectors in Ontario. Our mandate is to promote healthy public policy and the role of nurses in shaping and delivering health services now and in the future.

RNAO is pleased to provide a written submission to the College of Nurses of Ontario (CNO) as part of the consultation process on a proposed by-law amendment requiring members to obtain professional liability protection (PLP).

The Association is gravely concerned with the changes that have been made to the proposed CNO by-law since this process began in 2010 and we urge the CNO Council to leave politics aside and do what's best for the public. The potential risks to the public associated with the most recent amendments made by the CNO are substantive and we introduce the most salient ones in this submission.

Statutory Review:

The civil liability process ensures that victims of negligence receive adequate compensation for harm and/or wrongdoing suffered. RNAO has long been on record advocating that all regulated health professions must personally hold their own PLP as a matter of protecting the public interest. Therefore, RNAO was pleased when the *Regulated Health Professions Statute Law Amendment Act* was passed by the Ontario Legislature in 2009 and adopted the substantive feedback provided by RNAO. This statute amended a number of provisions within the *Regulated Health Professions Act (RHPA)*, including section 13.1(1) which specifies that:

No member of a College in Ontario shall engage in the practice of the health profession unless he or she is personally insured against professional liability under a professional liability insurance policy or belongs to a specified association that provides the member with personal protection against professional liability.

In 2010, RNAO was pleased to respond to an initial consultation process undertaken by the CNO regarding a proposed by-law amendment requiring all CNO members to personally hold PLP. The wording of this by-law was reflective of the requirement within section 13.1(1) of the *RHPA* that each regulated health professional **personally** hold PLP. RNAO was also pleased that the CNO recognized the comprehensive PLP offered as an automatic benefit of membership in RNAO as a condition that would satisfy this requirement. However, despite an active and productive engagement process, these by-law amendments were never approved by the CNO Council.

It is most concerning that despite being democratically enacted within the Legislature over three years ago, the Minister of Health and Long-Term Care has not proclaimed in-force Section 13.1(1) of the *RHPA*. No reason has been communicated by the Minister for this delay.

In 2013, provisions within Ontario Regulation 275/94 - 'General' under the *Nursing Act* were proclaimed in-force to indicate:

The member shall maintain professional liability protection in accordance with the requirements, if any, set out in the Colleges [of Ontario] by-laws.

Recently, CNO has communicated that:

The Minister of Health and Long-Term Care has recently issued a directive to all Health Regulatory Colleges that requirements for members to have and maintain professional liability protection must be in place on or before March 31, 2014.

Once again, by-laws have been developed by CNO to satisfy this requirement. However, RNAO is deeply concerned with the changes that have been made to the proposed by-law amendment since 2010. RNAO has concerns with several provisions within the revised by-law, which are outlined below.

Overview of Concerns and Recommendations:

#1) Indemnity for All Errors and Omissions

Proposed By-Law Wording:

Section 44.4.01: Every member holding a certificate of registration in the General, Extended, Temporary, Emergency Assignment of Special Assignment class shall maintain professional liability protection to indemnify the member for all errors and omissions that may occur while practising nursing in Ontario.

Concern: RNAO is concerned that PLP is now required to “indemnify the member for all errors and omissions that may occur while practising nursing in Ontario”. This is a change from the previously proposed by-law amendment, which did not require indemnification “for all” errors. It may be challenging for any form of PLP to meet this requirement due to several factors such as: possible exhaustion of limit, possible coverage exclusions, discretionary decisions on providing financial assistance, etc.

Recommendation: RNAO recommends that the CNO Council provide more detail on the reasoning for this change and conduct a detailed analysis of the implications, involving RNAO and other key stakeholders, before passing this provision.

#2) Association Membership

Proposed By-Law Wording:

Section 44.4.02: The professional liability protection referred to in 44.4.01 shall be provided through one or more of the following:

ii) by virtue of membership with a Canadian or Provincial nursing association that provides protection for professional liability as a benefit of membership or by exercise by the member of an option available as a result of membership with that association.

Concern: Unlike the 2010 proposed by-law amendment, membership within RNAO is no longer specifically listed as a recognized source of PLP despite offering a comprehensive PLP solution to all members through the Canadian Nurses Protective Society. Moreover, RNAO is deeply concerned that the previous provision requiring the CNO Executive Committee to approve “Canadian or Provincial nursing associations” as recognized sources of PLP, has been omitted. Moreover, this omission is inconsistent with the legal requirement articulated within Section 13.1(1) of the *RHPA*:

...or belongs to **a specified** association that provides the member with personal protection against professional liability.

The proposed by-law provision is not within the public interest given that there is no oversight or means of verifying whether an association offers adequate liability protection. This represents a significant risk to the public that CNO must address.

Recommendation: RNAO recommends that the CNO Council adopt the 2010 wording of the proposed by-law amendments whereby RNAO was specifically named as an approved source of PLP:

The professional liability protection shall be either based on a policy of insurance from an insurer who is licensed under the Insurance Act, Ontario and in respect of which the member is specifically named as an insured by virtue of membership with the Registered Nurses’ Association of Ontario, the Registered Practical Nurses Association of Ontario or with another Canadian or Provincial nursing association approved at the time by the Executive Committee (Proposed Amendments to General By-Law, 2010, College of Nurses of Ontario).

Furthermore, RNAO recommends that the CNO Executive Committee must exercise its due diligence by implementing an approval process for a Canadian or Provincial Nursing Associations to meet the requirement.

#3) Limitations of Vicarious Liability Protection

Proposed By-Law Wording:

Section 44.4.02: iii) a policy of insurance obtained by an employer of the member which provides liability protection for the member.

Concern: This condition enables nurses to rely on an employer's liability insurance policy through the principle of vicarious liability, which RNAO does not feel is within the public interest. RNAO strongly disagrees with this provision for the following reasons:

- It is not consistent with Section 13.1(1) of the *RHPA* which requires that each regulated health professional *personally* hold PLP, which undermines the democratic functions of the elected Legislature.
- There is an inherent conflict of interest that exists within the principle of vicarious liability. The interests of the health-care organization are the interests of the health-care organization and do not necessarily reflect those of the public or the nurse.
- Employment arrangements and professional partnerships are becoming more complex, impacting an employer's ability to provide adequate liability protection.
- It promotes inconsistent PLP requirements across regulated health professions, which serves as a barrier towards successful interprofessional collaboration (see Table 2). More specifically, the provision conflicts with requirements under the *RHPA* mandating that Ontario's regulatory colleges work together to enable interprofessional collaboration. As patient needs become more and more complex, the role of the nurse is greatly evolving and expanding. For example, the Premier of Ontario announced in April 2014 that she will be expanding the role of the RN. Continued role expansions demonstrate the limitations of vicarious liability and demand that all nurses personally maintain their own PLP to protect the public.
- Professionals can be liable jointly and severally for the damages awarded. This means the claimant may recover full compensation from any one of the negligent professionals, even though one professional may then be paying for more than their share of the damages. Nurses who do not hold their own PLP may not be able to adequately compensate a victim of negligence.
- Personally holding PLP supports the nurse to be fully transparent without the uncertainty of whether open communication in a patient's interest would impact negatively on their liability protection. Relying on an employer's insurance coverage may limit a nurse's ability to speak out, while maintaining "whistle-blower" protection.
- There is no means in place for nurses to verify that employers have an appropriate policy of insurance and/or a policy of insurance with sufficient coverage to adequately compensate a victim of negligence.

- The predominant role of the nurse is that of an expert clinician who provides sophisticated and comprehensive health services. Maintaining an awareness of how to interpret corporate insurance policies is not a competency held by most nurses. This may lead nurses to unintentionally make misinformed assumptions that their employer’s insurance policy satisfies all of the requirements specified in Section 44.4.03 of the proposed by-law amendment, including an extended reporting period of at least two years.
- Nurses without their own PLP may be hesitant to provide emergency assistance to the public as not all forms of negligence are exempt from the *Good Samaritan Act*. A nurse is a nurse 24 hours a day and the ethical/moral bounds of responsibility do not end in the workplace.

Recommendation: RNAO recommends that the CNO Council remove Section 44.4.02(iii) and require that each individual nurse in Ontario personally hold their own PLP. It is not within the public interest for nurses to rely on insurance coverage of their employer.

Lastly, a national scan shows that Ontario is the only jurisdiction in Canada whereby RNs are not required to personally hold PLP:

Table One: National PLP Requirements for RNs

Province	Requirement
Alberta	Provincial Council approved adding a requirement that all RNs must have PLP. Still requires final approval by government following the usual consultation process. However, this is a technicality being clarified within the regulations. Currently, all RNs must personally maintain professional liability protection offered through the College & Association of Registered Nurses of Alberta.
British Columbia	All RNs must personally maintain professional liability protection for negligence in the amount of at least \$1 million per claim.
Manitoba	All RNs must personally maintain professional liability protection offered through the College of Registered Nurses of Manitoba.
New Brunswick	All RNs must personally maintain professional liability protection offered through the Nurses Association of New Brunswick.
Newfoundland	All RNs must personally maintain professional liability protection offered through the Association of Registered Nurses of Newfoundland and Labrador.
Northwest Territories/ Nunavut	All RNs must personally maintain professional liability protection offered through the Registered Nurses Association of Northwest Territories and Nunavut.
Nova Scotia	All RNs must personally maintain professional liability protection offered through the College of Registered Nurses of Nova Scotia.
Ontario	Bill 179, the <i>Regulated Health Professions Statute Law Amendment Act, 2009</i> requires mandatory professional liability protection, to be personally held by all regulated health professionals. However, the Minister of Health and Long-Term Care has not yet requested that these provisions be proclaimed in-force. Regulations under the <i>Nursing Act</i> were recently amended to require nurses to satisfy PLP requirements established in the by-laws of College of Nurses of Ontario.
Prince Edward Island	All RNs must personally maintain professional liability protection offered through the Association of Registered Nurses of Prince Edward Island.

Province	Requirement
Quebec	All RNs are personally required to hold liability protection.
Saskatchewan	All RNs must personally maintain professional liability protection offered through the Saskatchewan RN Association.
Yukon	All RNs must personally maintain professional liability protection offered through the Yukon Registered Nurses Association.

Moreover, a review of the by-laws of each of Ontario’s health professional regulatory bodies shows that the predominant approach across Colleges is that each member is required to **personally** hold their own PLP. As a matter of patient safety, how is it possible that CNO, regulating the largest professional group by membership (approximately 150,000 RNs and RPNs), is proposing that it is sufficient for members to not personally maintain their own PLP? Authorizing nurses to rely on the PLP coverage of their employer creates unparallel risks to the public.

Table Two: PLP Requirements of Ontario’s Regulated Health Professions

Profession	Required to Personally Hold PLP
Medicine	Yes
Midwifery	Yes
Pharmacists	Yes
Dentists	Yes
Denturist	Yes
Dental Hygienists	Yes
Dental Technologists	Yes
Massage Therapists	Yes
Occupational Therapists	Yes
Opticians	Yes
Ophthalmologists	Yes
Psychology	Yes
Medical Radiation Technologists	Yes* *Currently in consultation
Nursing	No* *Currently in consultation for RNs/RPNs. Mandatory for NPs.
Chiropractors	No* *Most chiropractors are personally required to hold PLP because they are self-employed.
Chiropodists/Podiatrists	No* *Most chiropodists/podiatrists are personally required to hold PLP because they are self-employed.
Physiotherapists	No

Profession	Required to Personally Hold PLP
Kinesiologists	No
Dieticians	No
Respiratory Therapists	No
Medical Laboratory Technologists	No* *Currently in consultation

In summary, RNAO strongly supports the Ontario Government's amendments to the *Regulated Health Professions Statute Law* passed by the Ontario Legislature in 2009, including section 13.1(1) which specifies that

No member of a College in Ontario shall engage in the practice of the health profession unless he or she is personally insured against professional liability under a professional liability insurance policy or belongs to a specified association that provides the member with personal protection against professional liability.

RNAO is gravely concerned with the changes that have been made by the CNO to the proposed by-law amendment since 2010, as it represents a substantive risk to the public and has the potential to significantly compromise Ontario's nurses, and we urge the CNO Council to reject these changes. RNAO recommends that the CNO Council ensure that each individual nurse in Ontario is required to personally hold their own PLP as it is not in the public interest for nurses to rely on liability coverage of their employer.