



**INTERNATIONAL COUNCIL
OF NURSES**

3, place Jean-Marteau
1201 Geneva, Switzerland
Tel. +41 22 908 01 00
Fax +41 22 908 01 01

E-mail: icn@icn.ch
Web site: www.icn.ch

Guidelines

**Law and
the Workplace**



LAW AND THE WORKPLACE GUIDELINES

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PREFACE

Nurses as employers, employees, managers and nurse representatives must be aware of and abide by the various laws in effect that pertain to the workplace. It is in the interest of nurses worldwide to understand the content and implications of their legal rights and responsibilities.

The intent of these guidelines is to assist nurses and their national nurses associations (NNAs) in a review of local, regional and global laws. This will:

- establish the link between regulation, socio-economic welfare and professional practice;
- facilitate the identification of gaps, contradictions and possible obstacles to professional development that exist within the current legislative framework;
- identify the legal basis for NNA programmes;
- clarify legal avenues for collective and individual pay bargaining, grievance hearings and industrial action;
- determine future areas where legal or legislative actions might be needed.

In addition, we trust these guidelines will be a useful tool for nurse educators in their teaching and for nurse leaders in their campaigns to improve and advance nursing.

David C. Benton
Chief Executive Officer
International Council of Nurses (ICN)

INTRODUCTION

'If he only knew a little of law, he would know a little of everything.'

The law touches all human activity, be it in a discreet indirect manner or a direct controlling fashion. Law influences every individual's conduct and environment. The study of law provides insight to the inter-relationships which exist within a particular society and the way in which that society as a whole chooses to be governed.

There is broad agreement that law serves a dual function: social control and conflict settlement.¹ References to law are however no longer restricted to legislation ('the will of the legislators').² There are many sources of law, only one of which is legislation or the enacted law. For the purposes of these guidelines, law will be used in this broader generic context.

NURSING ISSUES AND THE LAW

Depending on the historical development and dominant role given to the various sources, the legal system will differ from country to country in its approach and procedural infrastructure. Nurses and their organisations, such as national nurses associations (NNAs), must understand the legal context within which they operate if they are to be effective and relevant.

Globalisation introduces an increasing interest in the harmonization (or at minimum the complementarity) of national laws at the international and global level. The negotiation and adoption of international trade agreements, standards and codes of practice is becoming more frequent as the interdependence of countries, their economies and their labour markets, is more obvious. ICN has the mandate to represent nurses and nursing internationally and strengthen nursing leadership, thus advancing this representation at all levels.

The law in health plays its traditional role of 'formulating rights and duties, expressing policy, giving proper weight to the interests of the various sectors of society, protecting individuals and the community and laying down norms and standards'³.

Professional Issues

Many professional nursing issues are regulated by law. Among the most important of course is the regulation of the profession. As mentioned, countries differ in their approach depending on their historical development. In many cases, law specifies the roles, functions and responsibilities determined to be within nurses' scope of practice.

The authority to decide the educational requirements for professional qualification and license to practise, the development and/or enforcement of nursing practice standards and the resulting disciplinary procedures

* Said of Lord Brougham, in Ralph Waldo Emerson
'Quotation and Originality' (1877)

may be granted by law to the Ministry of Health, a nursing council, a multidisciplinary regulatory body or combinations of the above. If such bodies exist, their composition and mandate will be determined by law.

The obligation to pass a state or national licensing exam and the obligation to register once qualified are determined by law. If a requirement for periodic renewal of registration (or licence) exists, and perhaps the obligation of continuing education courses for renewal, this will also be fixed by law.

Some countries have specified minimum or maximum nurse/patient ratios in the law as well as the introduction of the nursing process in patient care. The legal 'weight' given to nursing notes may also be decided by law. The degree to which workers' participation and quality assurance mechanisms are supported by law influences their effectiveness in and power to influence the development of high level care.

Legal tools – such as contracts, collective agreements and regulations, depending on their content – will also have an impact on professional issues. For example, collective agreements fixing the hours and access to continuing education will affect nurses' professional development, career advancement as well as job satisfaction.

Standards are not applied solely to individuals but also to places and things. Government health standards for institutions may include operational licensure, code requirements, architectural norms, and limits on the emission of various pollutants. Standards applicable to things include not only food and drug laws but also the regulation of hazardous products and their safe disposal once used.

The rapport between law and professional conduct is an increasingly sensitive and frequently debated question. The expansion of nurses' responsibilities in practice has often exceeded the scope of legally assigned responsibilities. The nurse's accountability is often not easily determined and largely depends on the tradi-

tions and customs of the country and, at times, the different health care settings of the same country, e.g. differing norms of practice between the rural and urban nurse depending on the availability of other health care personnel.

The introduction of telemedicine and telenursing has added to the complexity of the legal status of nurses. Which set of laws apply to the nurse working in one country but providing services in another? When trade agreements tend to facilitate the mobility of persons, which body will regulate the professions and protect the public? Mutual recognition agreements have been developed in several areas of the world (e.g. Caribbean, European Union). Professional regulation will be one of the key issues negotiated in future international trade meetings.⁴ It will be important that the profession safeguard its right to self-regulation and that standards are not lowered for the sake of harmonization.

Malpractice or professional negligence has been broadly defined as the 'failure of a health care provider to exercise the reasonable and ordinary care a (similarly) qualified practitioner would exercise under the same or similar circumstances'.⁵ To help determine 'reasonable and ordinary care', standards of practice must be available.

Recent court decisions have incorporated evidence from a variety of sources in order to establish applicable standards of care. These have included statutory requirements, recognized standards of professional associations, and publications of health institutions and agencies. Courts however vary in their willingness to recognize sources such as practice codes drafted by the nursing profession. Where countries are politically separated by province or state, different attitudes may exist even within the same country.

Member countries of the European Union recognise a code of conduct as legally binding only if it has been adopted by legislators or by royal decree. The code is

however taken into consideration by the courts in their investigations. ICN and nurses' associations have a crucial role to play in the development of ethical codes and standards of practice. For further information refer to *The ICN Code of Ethics for Nurses*.

Governments may request professional associations to develop a code of conduct for a specific medical act, for example, euthanasia. One country comes to mind where such a code was drafted, accepted by the government bodies and put into practice but not into law. The result was a very ambiguous link between criminal law which deals with murder and health practice codes which allow euthanasia under specific conditions. Changes in the law were needed to provide clear guidance on this issue.

Certain countries recognise the right of nurses to refuse to participate in professional activities that are contrary to the nurse's personal convictions. However, this right is usually denied if such refusal places the patient in jeopardy.⁶

Similarly, some professional associations are providing nurses with procedures to clearly object to unsafe working conditions which might include a dangerously low nurse/patient ratio or an assignment to a ward where the nurse did not have the necessary theoretical or practical experience. These instances safeguard primarily the rights of the patient. However, certain countries have adopted laws which give the worker the right to refuse any assignment which directly endangers the worker. This clause has been applied in factories with regard to the use of unsafe machinery but has not been generalized to include dangerous situations for health personnel.⁷⁾

The nurse, in the role of employee as well as independent contractor, must exercise professional judgement and apply it in practice. Nurses are no longer protected by a physician's order if that order is not acceptable medical practice⁸. The NNA needs to ensure nurses' access to continuing education courses, includ-

ing legal preparation for practice and professional support. Increasingly, NNAs are offering legal aid as a membership benefit which is much appreciated.

The law also has an impact on the ethics of research. Countries have regulated the creation, functions and methods of work of ethical review boards meant to screen research projects funded with government monies. As the need for nursing research becomes more readily recognised, it is important that the law allows nurses to participate in the review bodies and that the project criteria support the qualitative research often undertaken by nurses.

Labour Issues

Labour law also affects nurse's practice in the workplace. There is law which determines workers' general conditions of employment such as occupational health coverage, minimum leave, maximum hours, retirement age, allowances, compensation, etc. In many countries, the basic public employee pay scale is legislated and nurses' remuneration is therefore determined by the profession's classification within this grading. While the pay scale is intended only for the public sector, private sector employers often use the scale as a factor when deciding pay and benefits for their personnel.

If working for the government, nurses may be subject to specific laws which cover public employees. In certain countries, there are different laws covering employees providing essential services when this distinction is made.

It is important to understand which laws apply to the profession, as this will influence the political and industrial action nurses may legally undertake – not only the extent to which it may be carried out but also the procedures involved. For example, mandatory fact-finding and mediation (or in some cases arbitration) may be imposed on nurses but not on the general workforce and strike notice may be longer than usual.

Labour laws will identify what action is possible and through which mechanisms. Time frames may be fixed. The creation of conciliation and/or arbitration services will be specified as well as their composition and method of work.

The right to negotiate is granted in many cases by law as well as freedom of association and the right of representation. The latter often specifies certain criteria to be met by a potential workers' organisation, i.e. representation election, size, category of personnel. Membership in the negotiating units and in the organisations may be defined. Grievance procedures and the creation of the responsible services or infrastructure may be determined by law as well.

If collective bargaining is allowed, the scope of such negotiations is often included in the law. It may also differentiate between what is to be negotiated nationally (centrally), provincially or locally and the scope of bargaining at the local, enterprise or individual level.

INDUSTRIAL RELATIONS

All members of the International Council of Nurses (ICN) need and are in a position to determine the extent to which they wish to affect the industrial and professional climate and infrastructure within which their members work.

The specific course of action taken by an association will depend on the objectives and priority issues identified by the membership. The extent of activity and the allocation of resources must necessarily conform to the consensus reached. Some associations have determined that they should operate only on professional matters while others have decided that they should act both as a professional association and as an industrial body or trade union. There are cases where associations function in all three areas – as a regulatory body, professional union and professional association but these are the exception.⁹

An association may therefore be solely concerned with professional development or it may also deal with pay and conditions of employment. In both cases, the association is involved in a socio-economic welfare programme, to the extent that such a programme is defined as one which is concerned about the balance of interests between employers and employees.

There is a growing awareness on the part of nurses' associations that they cannot effectively promote their professional objectives if they do not actively pursue the socio-economic welfare of their members. The ability of a profession to advance the service it provides and to maintain high standards of performance is dependent on its ability to attract persons of the required calibre to the profession and retain them in active practice. The link between professional issues and socio-economic questions within a common legal framework is increasingly being recognised.¹⁰

LEGAL STATUS OF THE ASSOCIATION

The approaches selected by the national nurses associations (NNAs) to tackle priority issues may differ depending on numerous factors, including:

- the national legislation;
- the composition of its membership;
- the size and degree of influence of the association;
- its financial and other resources;
- current networks and cooperative agreements;
- the industrial relations as practised in the country, etc.

In many cases, the right to negotiate pay and conditions of employment and/or to influence professional matters requires that the association comply with particular national laws in the country which confer an officially recognised identity to the association. It is important that these requirements be known in detail and appropriate action taken to ensure that the association is in a position legally to carry out its objectives. These objectives must be clearly stated in the organisation's constitution.

Associations need to consult civil law in general as well as labour law in particular to ascertain the rights and responsibilities of trade unions and professional associations. Law may also exist which specifically addresses organisations which perform both functions. The advice of industrial or legal experts may be required to ensure that initiation of a socio-economic welfare programme is appropriate for the organisation.

Special considerations may appear in the law which prohibit certain categories of personnel or limit their action within the organisation. For example, some countries prevent supervisor-grade personnel from joining unions. Other countries specifically limit access of certain members to leadership positions.

Legislation may also restrict certain fields of activity according to the size of membership within the organi-

sation (e.g. percentage of workers represented in a specific workplace/country, proportion of public vs. private sector employees).

Issues facing nurses as employees are often the same as for all employees. In many countries, one or more organisations exist which deal with country/sector/enterprise-wide provisions such as standard hours of work, minimum annual leave and maternity leave. Associations need to examine carefully whether there would be advantages to nurses if the association joined or affiliated with such confederations, and whether this can be done without jeopardizing their autonomy and objectives.

PROGRAMME DEVELOPMENT

Nurses' associations – in an attempt to promote quality care, the advancement of the nursing profession and satisfactory conditions of employment – may decide to implement/maintain/expand a socio-economic welfare programme.

The principle strategies for developing an SEW programme are:

- clarify the aims, objectives and priorities of the association;
- determine the association's objectives regarding a socio-economic welfare programme;
- establish the means of meeting these objectives after exploring all legal avenues available to the association;
- guide the members on how the objectives are to be met while ensuring democratic decision-making structures within the association;
- evaluate the results of the programme in relation to the objectives on a regular basis;
- review and, if necessary, revise the programme objectives in accordance with the evaluation findings.

CONCLUSIONS

The law has a direct impact on nurses, their workplace and development of their practice. Law is generated from many sources. A basic understanding of the elements of law will facilitate the realisation of nurses' professional goals and the promotion of their labour rights. The nursing voice must be heard and nurses' associations must be actively involved in the development of law.

Nurses and their associations must function within a legal context. Working within this legal context or lobbying for changes in the law, NNAs will then develop their programmes and activities. Using the complex infrastructure of the law to its best advantage, NNAs will support their members in improving the standards of health care in the country as well as the professional, social and economic position of nurses.

SOURCES OF LAW

The science and philosophy of law has for many centuries been linked to three basic concepts:

1. Divine law or human nature.
2. Commands or will of the state.
3. Traditions and customs of the society.¹¹

A combination of the last two concepts is the most prevalent approach adopted today. The roots of law are important factors to consider when trying to understand the interrelationships which exist between the individual, or groups of individuals, and their legal system.

National Law

- **Constitutional law** defines the functions, powers and limits of government.¹²
- Statutory law is that created by legislative bodies which govern a wide variety of human activity, usually with the purpose of declaring, commanding or prohibiting something. The legislative process involves political manoeuvring and compromise; once agreement is reached, modification is often difficult. Depending on the level of decision-making, laws may be national, regional, state or local ordinances and have different names.
- A systematic compilation of statutes according to subject area is called a statutory code. This type of approach, the civil law system, is strongly reflected in the current legal systems of Western Europe, Latin America and French-influenced parts of the world (including Quebec, Canada and Louisiana, USA). Enacted laws are arranged into chapters, subheads, table of contents and index to make a complete body of laws designed to regulate subjects to which they relate, such as health, education, criminal law, etc.¹³

- **Administrative law** consists of the rules and regulations issued by departments, agencies, offices and bureaus to translate the broadly worded federal, state and local statutes into operative standards.¹⁴ Regulations have the force of law, yet deal with issues in more detail and are easier to modify than statutes.

The executive branch, entrusted with the direction of administrative agencies, enjoys considerable autonomy and can initiate measures by way of decree and thereby escape any control by the legislative branch. The executive branch may also issue directives which indicate the government's interpretation of a law and its intention of how to apply it. Although administrative directives do not have legal force, the distinction between regulations and directives is often absent in practice.¹⁵

An administrative agency may also adjudicate (judge, arbitrate). For example, in certain countries a Nursing Council is given the power to investigate and judge disciplinary complaints brought against nurses, i.e. malpractice, unprofessional conduct.

- **Common law**, as opposed to law created by legislative or administrative bodies, derives from earlier court decisions (legal precedent) as well as custom and tradition. Most English-influenced countries of the world follow the common law system complemented by statutory and administrative law. In principle, a past decision and its rationale will be upheld by a court (as well as by all subordinate courts) when it next confronts the same question.¹⁶ However, if the court can be convinced that a legal precedent was improperly formulated or no longer valid, the decision can be overruled, thereby granting flexibility to the system.

The organisation of the courts varies greatly from one country to another. Although the most common structure is hierarchical, some countries create an autonomous structure of administrative tribunals or yet other independent court systems.¹⁷

Judicial decision-making involves the process of interpreting law, be it common law (case law), statutes, codes or regulations, and applying it to a concrete case presented to the court.

Historical Relevance

Understanding the legal system of a country facilitates access to essential information. The procedures necessary to introduce, adapt, remove or consult legislation, regulations or common law relevant to identified priorities are determined by the philosophy of law adopted in that country. The source of law not only indicates the law's jurisdiction (extent of authority) but also how it can be challenged or changed.

Law is usually very complex and many factors need to be considered. Legal counsel is necessary in most cases. However, the quality of a legal consultation will greatly improve if the parties involved are well informed and can relate the problem to its proper legal context.

International Law

The evolving means of transportation and communication have greatly influenced the interrelationships of countries within the international community. Facilitated travel and quicker dissemination of information have encouraged a greater interdependence not only in commerce and trade but also in the legal transaction of daily activities. Increasingly, governments sign international agreements, become members of international organisations, adhere to international declarations and ratify international conventions. Several international organisations impact on health services, for example, the International Labour Organisation (ILO), the World Health Organization (WHO), and increasingly the World Trade Organisation (WTO).

The **International Labour Organization** endeavours to induce all nations to adopt humane working conditions by developing international standards to serve as models for national law and practice. Once a country has ratified one of these conventions, the government is

held accountable to carry out the terms of the instrument. The ILO Conventions cover practically all aspects of human labour: employment, conditions of work, social security, labour relations, freedom of association, equal opportunity and other human rights. Convention 149 and Recommendation 157 specifically focus on nursing personnel and therefore are particularly relevant for the profession. Other conventions however provide minimum standards that are also useful in the improvement of nurses' pay and working conditions, e.g. equal opportunity, freedom of association, occupational health and safety, maternity protection.

Article 23 of the **World Health Organization** Constitution allows the World Health Assembly to adopt recommendations which, while not legally binding, have a strong persuasive effect on Member States. Other instruments have been created that are more legally binding, e.g. International Code for Marketing of Breast Milk Substitutes, Framework Convention on Tobacco.

The **World Trade Organization** is the only international organisation dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible. At the heart of the system — known as the multilateral trading system — are the WTO's agreements, negotiated and signed by a large majority of the world's trading nations, and ratified in their parliaments. These agreements negotiated and signed by governments are the legal ground-rules for international commerce. Essentially, they are contracts, guaranteeing member countries important trade rights. They also bind governments to keep their trade policies within agreed limits.

WTO's Council for Trade in *Services* adopted the *Disciplines on Domestic Regulation in the Accountancy Sector*. The disciplines now adopted, in addition to transparency requirements and other general provisions, contain provisions on the administration of

licensing requirements, qualification requirements and procedures, and technical standard for the accountancy profession. A key provision is the general requirement that measures taken for these purposes should not be more trade-restrictive than is necessary to fulfil a legitimate objective. Such Disciplines may be extended or adapted to other professions, e.g. nursing.

Decisions or legislation adopted by regional organisations may also affect health services. Certain countries have felt the need to organise regionally. For example, the Nordic Council (five members) was created in 1952 to provide a forum for discussion of common issues. Although this Council has no binding authority, it may address recommendations to the member governments or to the Nordic Council of Ministers.

The European Union (EU) has linked countries in the region through formal constitutional law. The EU has the power to issue regulations which are directly binding in all member countries. The EU also issues directives that must be put into effect through national law. Such directives have been adopted regulating minimum education requirements for nurses. The EU expansion will automatically increase its influence on the regulation of nursing in the region.

**Nurses do not practise in isolation.
They must take into consideration the law which regulates their profession, determines their conditions of work and establishes procedures for political as well as industrial action.
International law as well as national law has a role to play in structuring our professional and personal life.**

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