

The Nursing and Midwifery Board of Ireland A Guide to Fitness to Practise

March 2017



Bord Altranais agus
Cnáimhseachais na hÉireann
Nursing and Midwifery Board of Ireland



The Nursing and Midwifery Board of Ireland A Guide to Fitness to Practise

The Nursing and Midwifery Board of Ireland (NMBI) is the statutory regulatory authority for nurses and midwives in Ireland. It is governed by the provisions of the Nurses and Midwives Act 2011 (the 2011 Act).

Protection of the Public

Section 8 of the 2011 Act explicitly states that

“The object of the Board shall be the protection of the public in its dealings with nurses and midwives and the integrity of the practice of nursing and midwifery through the promotion of high standards of professional education, training and practice and professional conduct among nurses and midwives”.

NMBI primarily carries out its role in protecting the public through its work in the areas of education, registration and professional standards. It also protects the public by investigating complaints against nurses or midwives through the operation of the Fitness to Practise process.

The Fitness to Practise Process

Who can make a complaint?

Under the 2011 Act any person or the Board can make a complaint against a nurse or midwife. A complainant is kept informed of the progress of the case throughout the process.

Most complaints are made by employers. The number of complaints from members of the public, usually patients or their families, has increased in the last few years.

NMBI cannot investigate complaints against a person who is not a registered nurse or registered midwife or complaints against healthcare facilities.

Who considers the complaints?

Complaints are considered first by the Preliminary Proceedings Committee (PPC). This is a screening committee whose work is independent of the Board. Members of the committee include nurses, midwives and individuals who are not and never have been nurses or midwives in Ireland or any other country ('lay members'). Committee members include Board members and non-Board members. There are ten members of the PPC. Members of the PPC undertake training for their role on an on-going basis. Conflict of interest checks are carried out before every case is considered and if a member of the PPC has a conflict of interest, they do not participate in the consideration of the case.

Grounds for complaint

Under the 2011 Act, there are nine grounds for complaint. The complainant may specify a ground or grounds; however, not specifying the grounds will not stop the complaint being considered. The PPC may refer the complaint for an inquiry on different or more grounds than the complainant identified. The nine grounds, as set out in section 55 (1) of the 2011 Act are:

- (a) professional misconduct,
- (b) poor professional performance,
- (c) non-compliance with a code of professional conduct,
- (d) a relevant medical disability,
- (e) a failure to comply with a relevant condition,
- (f) a failure to comply with an undertaking or to take any action specified in a consent given in response to a request under section 65 (1),

- (g) a contravention of the Act (including a provision of any regulations or rules made under the Act),
- (h) an irregularity in relation to the custody, prescription or supply of a controlled drug under the Misuse of Drugs Acts 1977 and 1984 or another drug that is likely to be abused,
- (i) a conviction in the State for an offence triable on indictment or a conviction outside Ireland for an offence consisting of acts or omissions that, if done or made in Ireland, would constitute an offence triable on indictment.

Where a nurse or midwife has been convicted of an offence that falls under section 55 (1) (i) of the 2011 Act, the case is referred immediately by the PPC to the Board. Having considered the case, the Board may cancel the nurse or midwife's registration or refer the case back to the PPC for consideration.

Further information regarding grounds for a complaint can be found at the back of this booklet.

What happens when a complaint is received?

When a complaint is first received, we write to the complainant and acknowledge receipt of the complaint. We also send the complainant a copy of the procedures of the PPC.

The next step in the process is to ascertain that the individual complained about is a nurse or midwife registered with NMBI. If the complainant is an employer or a nurse or midwife manager, then identifying the individual on the register usually does not pose a problem. If the complainant is a member of the public, then we may need to take various steps to identify the nurse or midwife on the register.

We may request further information and supporting documentation from the complainant, particularly if the initial letter of complaint lacks detail.

We will then write to the nurse or midwife informing them that there has been a complaint made against them. We enclose a copy of all documentation received from the complainant and invite the nurse or midwife to respond. A timeframe for a response is given; this is usually six weeks. A copy of the procedures of the PPC will also be sent to the nurse or midwife and this will explain what can happen in relation to the complaint.

What should a nurse or midwife do if a complaint is made against them?

If a nurse or midwife is the subject of a complaint, they are strongly advised to seek advice before responding to the complaint. This can be done by contacting their union, if they are a member, or by seeking legal advice. If a nurse or midwife is not a union member and does not choose to seek legal advice, then we recommend that they seek support from a family member or friend before responding. A nurse or midwife may also wish to consider discussing the complaint with their employer – if the employer is not the complainant.

If a nurse or midwife is being represented by their union or by a solicitor, then the Fitness to Practise Department should be informed in writing of this by the nurse or midwife or their representative as soon as possible. A copy of all documentation in relation to the complaint will then be sent directly to the representative.

Consideration by the PPC

Once the PPC has considered the complaint and any response received from the nurse or midwife, the PPC may do one or more of the following:

- (a) Request more information from the complainant. Any additional documentation received will be sent to the nurse or midwife. If, without a reasonable explanation or excuse, the complainant does not comply with this request, the PPC may refuse to consider the complaint any further. The PPC has the legal power to compel the production of documents if they are not provided voluntarily.
- (b) The PPC may require the nurse or midwife to provide specific information to the PPC with regard to the complaint.
- (c) The PPC may decide to send the nurse or midwife's response to the complainant for response. If the complainant responds, this response will be sent to the nurse or midwife for further comment.
- (d) The PPC may commission an expert report in relation to the complaint. If they do this, it will be sent to the nurse or midwife for any further response they wish to make.
- (e) Consideration of a complaint by the PPC may be deferred in certain circumstances, e.g. where there is an on-going criminal investigation.
- (f) If a complaint is withdrawn while it is being considered by the PPC, the PPC may, with the Board's agreement, take no further action or proceed as if the complaint had not been withdrawn.

The PPC is assisted in its investigation of complaints by staff in NMBI who are appointed as Case Officers. These Case Officers communicate with complainants and nurses or midwives and their representatives on behalf of the PPC.

Decision of the PPC

Before deciding whether or not further action should be taken in relation to a complaint, the PPC will consider all information concerning the complaint. It will also consider whether or not the complaint is trivial, vexatious, without substance or made in bad faith.

When the PPC is of the opinion that:

- (a) there is not sufficient reason to take further action in the case, or
- (b) the complaint should be referred to another body or authority or to a professional competence scheme (*when this is established under Part 11 of the 2011 Act*), or
- (c) the complaint can be resolved by mediation or other informal means,

the PPC will inform the Board of that opinion. The Board may then either accept that opinion or reject it.

When the PPC is of the opinion that there is a *prima facie* case to warrant further action being taken, the PPC will refer the case to the Fitness to Practise Committee (FTPC) and this committee will hold an inquiry. The term *prima facie* means 'at first sight' or 'on the face of it'.

The Inquiry Process

Inquiry preparation

Preparation for an inquiry is carried out by staff in the Fitness to Practise Department and solicitors acting for the Chief Executive Officer. This process will usually involve reviewing documentation; seeking additional documentation; meetings with potential witnesses and taking of witness statements. Expert nursing, midwifery or medical reports may be commissioned. Production Orders can be issued by the Chair of the FTPC to compel the production of documents.

A Notice of Inquiry is prepared and sent to the nurse or midwife who is the subject of the inquiry and their representative. This sets out when the inquiry will be held; what the specific allegations are; and who will be called to give evidence. It is accompanied by a Book of Documents, which includes all the documents that may be used in the case.

Witnesses

All witnesses are sent a Witness Summons informing them where and when they have to attend the inquiry. In certain limited circumstances, a witness may give evidence by video-link, e.g. if they are living in another country and travelling back to Ireland is not feasible. The Witness Summons has the same effect as if it was issued by the High Court. Ignoring a Witness Summons is an offence for which a person may be prosecuted. Witnesses are sent a witness information booklet and a claim form for travel expenses.

Fitness to Practise Inquiries

Inquiries are heard by members of the FTPC. Members of the FTPC include nurses, midwives and individuals who are not and never have been nurses or midwives in Ireland or any other country ('lay members'). The FTPC includes Board members and non-Board members. Usually, five members of the FTPC hear each case: one nurse, one midwife and three lay members. At least two members of the FTPC will be Board members. Members of the FTPC undertake training for their role on an on-going basis. Conflict of interest checks are carried out before every case is considered and if a member of the FTPC has a conflict of interest, they do not participate in the consideration of the case.

Most inquiries last for one to three days but some are much longer. As a norm, inquiries under the 2011 Act are held in public. There may be special circumstances where the committee will allow part or all of the inquiry to be heard in private.

At an inquiry, a nurse or midwife is presumed innocent of the allegations against them. It is the role of the legal team acting on behalf of the Chief Executive Officer to prove the allegations. They must be proven beyond reasonable doubt. At the conclusion of an inquiry, the FTPC will prepare a report for the Board. A copy of this will be sent to the nurse or midwife and their representative.

Inquiry Reports

Inquiry reports contain the findings of the FTPC and, where applicable, recommend a sanction. The nurse or midwife who has been the subject of the inquiry and their representative is invited to attend the Board meeting and make submissions to the Board. The nurse or midwife will be provided with a copy of the Board's procedures and its publication policy.

Sanctions

The Board makes decisions on the issues of sanction and publication. The possible sanctions are

- cancellation of registration;
- suspension for a specified period of time;
- attachment of conditions;
- a censure and a fine not exceeding €2,000.00;
- a censure;
- an admonishment;
- an advice; and/or
- restrictions on the practice of nursing or midwifery;
- The nurse or midwife may also have their name removed from a division of the register.

All sanctions other than a censure, an admonishment or an advice require confirmation by the High Court before they take effect. The application to the High Court cannot be made until at least 21 days after the nurse or midwife receives notice of the Board's decision regarding sanction. During the 21-day period, a nurse or midwife may make an appeal to the High Court against the findings, the sanction or both. An appeal may involve a full rehearing of the case in court.

Notification

When a case has concluded and there are findings against a nurse or midwife resulting in a sanction other than an admonishment or an advice, NMBI is required to notify a number of different parties, namely:

- The Minister for Health,
- The Health Service Executive,
- The nurse or midwife's employer, and
- The regulatory authority in another jurisdiction, if the nurse or midwife is registered in that jurisdiction,

Publication

When a case has concluded and there are findings against a nurse or midwife resulting in a sanction other than an admonishment or an advice, it is the Board's policy to publish the findings and the sanction in each case unless there are exceptional reasons not to do so. Publication is made on the NMBI website and in its e-zine.

IMI Alerts

The IMI Alert system is an electronic means of a regulatory authority in one EU Member State communicating information to all other regulatory authorities across the EU. Since 18 January 2016, regulatory authorities have had to put an alert on the system if a registrant has been prohibited from practising or had restrictions placed on their practice. This means that NMBI puts an alert on the system if a nurse or midwife is removed from the Register, suspended or has conditions attached to their registration. The alert is removed if the restriction is lifted.

Immediate Suspension from the Register

When a complaint is initially received or when further information is received in relation to a complaint, it is reviewed to see if there are any immediate public protection issues if the nurse or midwife is allowed to continue to practise nursing or midwifery. If there are public protection issues, then the matter is brought to the attention of the Board as a matter of urgency. A Board meeting is held to which the nurse or midwife concerned is invited, together with their representative. The Board will consider whether or not to make an application to the High Court to immediately suspend the nurse or midwife from the register. The High Court hearing is held in private. It is a decision of the High Court as to whether or not an Order is made granting the suspension under section 58 of the 2011 Act. This Order usually lasts until the entire fitness to practise process has been completed. If the High Court makes an Order suspending a nurse or midwife's registration, the Order will also usually allow NMBI to notify certain parties, e.g. an employer, and to amend the on-line register to reflect the change in the nurse or midwife's registration status.

Types of Complaints

Complaints usually fall into one or more of the following categories:

- **Clinical practice or competency.** This may involve a complaint about a single episode of care, e.g. looking after a particular patient or a group of patients on a particular shift or in a particular unit. Competency complaints usually relate to on-going concerns about standards of care that have not responded to education, support and supervision. Denial or concealment of problems will often make the concerns more serious. In the category of clinical practice or competence complaints, medication management is the most frequent area of concern, followed by a failure to adequately assess a patient's condition, a failure to identify deterioration in a patient's condition, and/or a failure to take appropriate actions if deterioration occurs. Deficits in the standard of documentation are often linked to these types of failures.
- **Behaviour.** This may involve verbal, physical, financial or sexual abuse. Such cases usually involve vulnerable patients, such as individuals with an intellectual disability, older persons and those with severe mental health problems. Theft, forgery or other instances of dishonesty may be the basis for a complaint. Rudeness, lack of respect or poor communication may also be a cause of complaint.
- **Health.** Nurses or midwives who have health problems are rarely the subject of a complaint provided their health problem is under control and does not impact on their ability to deliver safe care or their behaviour towards patients or colleagues. Nurses or midwives who deny that they have a problem or who refuse to follow the guidance of their healthcare provider may

become the subject of a complaint. The commonest reason for a health-related complaint is drug abuse, which may lead to a nurse or midwife being on duty in an unfit state, theft of drugs or prescription pads, or forgery of prescriptions. Alcohol abuse and serious mental health problems are the next most common health problems. Physical health problems are rarely the cause of a complaint.

Are many nurses or midwives the subject of a complaint?

There are currently over 90,000 nurses and midwives on the Register (over 60,000 are Active and over 30,000 are Inactive). NMBI receives less than 100 complaints each year, meaning that a very small number on the Register are the subject of a complaint. Nurses and midwives may however, become involved in the Fitness to Practise process as complainants or as witnesses in an inquiry. Though the number varies from year to year, approximately 30 - 35% of complaints progress to an inquiry.

Further Information

Further information is available on the website www.nmbi.ie/complaints.

The following booklets can be read or downloaded from the website:

- Making a Complaint.
- An Employer's Guide to Making a Complaint.
- What to do if a Complaint is made about you.
- What to do if called to give evidence at a Fitness to Practise Inquiry.

The Nurses and Midwives Act 2011 is available on www.irishstatutebook.ie

Further information regarding grounds for a complaint:

The grounds for a complaint are set out in section 55 (1) (a) – 55 (1) (i) of the 2011 Act.

(a) Professional misconduct.

Professional misconduct is not defined in the 2011 Act. It has been defined in case law, i.e. by a judge in a case. How professional misconduct is defined may change over time. Currently, the definition is that originally set down in a case involving a medical practitioner and applied by the High Court to nursing in the case of *Perez v An Bord Altranais [2005]*. It is defined as follows:

Conduct which is infamous or disgraceful in a professional respect is professional misconduct.

Conduct that would not be infamous or disgraceful in any other person, if done by a nurse or midwife in relation to his/her profession, may be considered professional misconduct.

Infamous or disgraceful conduct is conduct involving some degree of moral turpitude, fraud or dishonesty.

This is commonly referred to as 'the moral turpitude test'.

Conduct which could not be properly described as infamous or disgraceful and which does not involve any degree of moral turpitude, fraud or dishonesty may still constitute professional misconduct if it is conduct connected with his/her profession in which the nurse or midwife has seriously fallen short, by omission or commission, of the standards of conduct expected amongst nurses or midwives.

This is commonly referred to as 'the expected standards test'.

In the *Perez v An Bord Altranais* case, the judge went on to say that "it is irrelevant that such misconduct is attributable to honest mistake" and that "there is a duty to protect the public against the genially incompetent as well as the deliberate wrongdoers".

The full judgment in the *Perez* case can be found on www.courts.ie under 'Judgments'

(b) Poor professional performance.

This term is defined in section 1 (3) of the 2011 Act.

"poor professional performance", in relation to a nurse or midwife, means a failure by the nurse or midwife to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of a registered nurse or registered midwife, as the case may be, carrying out similar work.

Grounds (a) and (b) may relate to matters that occurred inside or outside Ireland.

(c) Non-compliance with a code of professional conduct.

Non-compliance will relate to the code as published relevant to the time of the alleged non-compliance with the code. If a new code is published after the date of the alleged non-compliance, it will not be relevant in the case.

(d) A relevant medical disability.

This term is defined in section 1 (3) of the 2011 Act.

"relevant medical disability", in relation to a nurse or midwife, means a physical or

mental disability of the nurse or midwife (including addiction to alcohol or drugs) which may impair his or her ability to practise nursing or midwifery or an aspect thereof.

- (e)** A failure to comply with a relevant condition.

A relevant condition is a condition attached to the registration of the nurse or midwife under the provisions of the 2011 Act. Details of when a relevant condition can be attached to the registration of a nurse or midwife can be found in section 51, 52(4), 73, 74, 79(3) and 81(3) of the 2011 Act. In summary, conditions may be attached at the time of entry to the register, following a fitness to practise inquiry or following restoration to the register. Depending on the circumstances, the conditions may be attached by the Board or by the High Court.

- (f)** A failure to comply with an undertaking or to take any action specified in a consent given in response to a request under section 65 (1)

This relates to agreements reached during the course of a fitness to practise inquiry held under the 2011 Act. Such agreements require approval by the Board. Full details are set out in section 65(1) of the 2011 Act.

- (g)** A contravention of this Act (including a provision of any regulations or rules made under this Act).

The 2011 Act is available on the Board's website at www.nmbi.ie. Regulations and rules, as they are made under the 2011 Act, will also be published on the website.

- (h)** An irregularity in relation to the custody, prescription or supply of a controlled drug under the Misuse of Drugs Acts 1977 and 1984 or another drug that is likely to be abused.

Guidance with regard to controlled drugs has been provided by the Board over many years in various medication management guidance documents.

The Misuse of Drugs Acts 1977 and 1984 and regulations made under these Acts can be accessed at www.irishstatutebook.ie.

- (i)** A conviction in the State for an offence triable on indictment or a conviction outside Ireland for an offence consisting of acts or omissions that, if done or made in Ireland, would constitute an offence triable on indictment.

Under Irish law, there are two ways in which criminal offences may be tried:

1. In a District Court before a judge.
There is no jury in such a case.
2. In the higher courts before a judge and jury.

A summary offence is one which can only be dealt with by a judge sitting without a jury. An offence 'triable on indictment' is one which may be or must be tried before a judge and jury. A clear explanation of the difference can be found on the Citizens Information website at www.citizensinformation.ie – Classification of crimes in criminal law.

This booklet aims to explain the Fitness to Practise process in a clear and straightforward manner. It is not a legal interpretation of the 2011 Act and should not be regarded as such.



Bord Altranais agus
Cnáimhseachais na hÉireann
Nursing and Midwifery Board of Ireland

Nursing and Midwifery Board of Ireland,
18-20 Carysfort Ave, Blackrock, Co. Dublin.
Tel: (01) 639 8500
Email: ftp@nmbi.ie
Web: www.nmbi.ie