

# A review of the fitness to practise processes conducted for the Nursing and Midwifery Board of Ireland

May 2014

## About the Professional Standards Authority

The Professional Standards Authority for Health and Social Care<sup>1</sup> promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament.

We oversee the work of nine statutory bodies that regulate health professionals in the UK and social workers in England. We review the regulators' performance and audit and scrutinise their decisions about whether people on their registers are fit to practise.

We also set standards for organisations holding voluntary registers for people in unregulated health and care occupations and accredit those organisations that meet our standards.

To encourage improvement we share good practice and knowledge, conduct research and introduce new ideas including our concept of right-touch regulation<sup>2</sup>.

We monitor policy developments in the UK and internationally and provide advice to governments and others on matters relating to people working in health and care. We also undertake some international commissions to extend our understanding of regulation and to promote safety in the mobility of the health and care workforce.

We are committed to being independent, impartial, fair, accessible and consistent. More information about our work and the approach we take is available at [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk).

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<sup>1</sup> The Professional Standards Authority for Health and Social Care was previously known as the Council for Healthcare Regulatory Excellence

<sup>2</sup> Professional Standards Authority. 2010. Right-touch regulation. Available at <http://www.professionalstandards.org.uk/policy-and-research/right-touch-regulation>

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# 1. Introduction

- 1.1 This report follows a request from the Nursing and Midwifery Board of Ireland (NMBI) for the Professional Standards Authority for Health and Social Care (the Authority) to undertake an end to end review of the fitness to practise processes of its predecessor organisation An Bord Altranais (ABA) focusing on decision making points, timelines and quality assurance. ABA operated under the legislative framework established by the Nurses Act 1985. The NMBI took over the functions of regulating the nurses and midwives in October 2012 and operates under the legislative framework established by the Nurses and Midwives Act 2011.
- 1.2 The NMBI is in a period of transition following the commencement of their new legislation in October 2012 and wishes to benchmark the performance of ABA under its governing legislation in order to identify areas for development and improvement. The Authority's Standards for Good Regulation were adapted by agreement to reflect the particular context and statutory framework within which the ABA operated. We have set out our view of the processes operated by ABA. Where relevant we have noted if the NMBI has improved a process (or where there is work in progress). We have also provided our recommendations based on our own experience.
- 1.3 Where we refer to the Fitness to Practise Committee in this report, we refer to the committee established under the 1985 Act.
- 1.4 The Fitness to Practice Committee itself raised concerns with the Board and the Executive regarding the timeliness and efficiency of the FTP processes in early 2012. This review was carried out between May and June 2013.
- 1.5 We hope that so far as this review refers to historical practices with ABA the new Board will make changes to ensure that the NMBI performs as an efficient and effective regulator.
- 1.6 The Authority undertakes annual performance reviews of the nine health professional regulatory bodies in the UK as part of our statutory responsibilities. We publish the outcome of those reviews annually to the UK Parliament and the devolved administrations. We have also, following requests from the organisations concerned, conducted reviews for the Royal College of Dental Surgeons of Ontario, Nursing Council of New Zealand, Medical Council of New Zealand, the General Teaching Council for England, the General Social Care Council in England and for the UK's Nursing and Midwifery Council. All these reports are available on our website.
- 1.7 Although the Authority has no statutory oversight of the NMBI, we consider that there are mutual benefits in this review. There are benefits to the NMBI in having an independent assessment which benchmarks its performance of fitness to practise in relation to other regulators. At the same time we have the opportunity to learn about different approaches to professional regulation and regulatory practice, which following publication of this report will be

shared with regulatory bodies in the UK, Ireland and internationally. This has been our first opportunity to study the Irish model of regulation.

- 1.8 We are grateful to the staff and Committee members of the NMBI, as well as their legal representatives, for providing us with documentation and responding to our queries about their processes. Their positive engagement and co-operation has assisted us greatly in being able to understand a variation on the UK model of regulation which is set against a strong constitutional framework. This report has greatly depended on their openness and co-operation and regular contact during our period of investigation and review. We have also benefited from the perspectives of stakeholders.

## 2. Scope of review and methodology

- 2.1 The Authority has an established process for undertaking performance reviews. This is based on a set of standards which we developed in liaison with the UK health professional regulators and other stakeholders including patients and the public. These are called the Standards of Good Regulation<sup>3</sup>. In undertaking this review we used our procedure and standards for undertaking performance reviews of the health professional regulators in the UK as a framework to guide our review of ABA. We worked with the NMBI to adapt the standards of good regulation to ensure they were relevant to the work of ABA/NMBI and to the legislative framework. In this review we have focussed solely on the fitness to practise process operated by ABA. During the course of our review in the UK, we would usually consider also the operation of the registration, education and standards functions as well as governance of the regulator. In so doing, we are able then to provide a holistic view of the performance on the regulator because the protection of the public depends on all parts of the regulator working together.
- 2.2 We have set out the standards we agreed with the NMBI at section 9. The report that follows is structured around our assessment of ABA's performance against the agreed standards. Our focus in this report has been the decision making points, timeliness and quality assurance. We did however review the complete set of fitness to practise standards. In undertaking this review we have not conducted any case audits.
- 2.3 The procedure followed in this review involved a scoping meeting with the Chief Executive/Registrar, the Acting Director of Regulation and the Chair of the Fitness to Practise Committee, and the consideration of written evidence which the NMBI provided in May 2013 prior to the review team working at the NMBI in Dublin between 29-30 May and 28 June 2013. During this period we:
- Reviewed documentary evidence produced by the NMBI including transcripts and reports of cases considered under the fitness to practise process

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<sup>3</sup> [http://www.chre.org.uk/img/pics/library/100601\\_The\\_Performance\\_Review\\_Standards\\_1.pdf](http://www.chre.org.uk/img/pics/library/100601_The_Performance_Review_Standards_1.pdf)

- Observed a meeting of the Fitness to Practise Committee
- Observed an Inquiry before the Fitness to Practise Committee
- Met with the Chief Executive, Acting Director of Regulation and members of staff within the Fitness to Practise Directorate
- Met with the Chair of the Fitness to Practise Committee
- Met with the both public and professional member(s) of the Fitness to Practise Committee
- Met with legal advisers to the Board and the Executive
- Spoke with stakeholders from the Irish Nurses and Midwives Organisation and Health Information and Quality Authority.

2.4 The majority of our review focusses on the processes established under the Nurses Act 1985 (1985 Act) and the policies associated with it; however it should be noted that in October 2012 the Nurses and Midwives Act 2011 (2011 Act) came into effect. The NMBI is in the process of putting in place its amended statutory scheme. We do however aim, in reviewing the processes which are still effective for the majority of cases, to draw out learning which can assist the NMBI in positioning itself as an effective regulator by learning from its past. All complaints received up to 2 October 2012 will be processed under the 1985 Act. All complaints received on or after 2 October 2012 will be processed under the 2011 Act.

2.5 We have set out our approach to effective regulation in our paper *Right-touch regulation*<sup>4</sup>. Right-touch regulation means using only the regulatory force necessary to achieve the desired effect. It sees regulation as only one of many tools for ensuring safety and quality and therefore that it must be used judiciously. Professional regulation exists not to promote or protect the interests of professional groups but to enhance patient safety and protect the public. The general approach to regulation set out in that paper underlies our Principles of Good Regulation and our judgement about the performance of the NMBI.

2.6 This report sets out our findings in relation to ABA/NMBI's fitness to practise processes. In our report we have made clear where through absence of information (because of the limited remit of the review) we have not been able to come to a firm conclusion about the NMBI's performance against a standard; in the main however we consider that the information we have been given, our examination of the work of the NMBI in practice and our discussions with Committee Members, the Chief Executive and staff have enabled us to come to a fair assessment of its performance against the standards of good regulation.

2.7 Finally, we have made some recommendations which will require further legislative change if the same were accepted. We make these suggestions using our own experience of systems and process that are effective in protecting the public and those that are not; we hope that the NMBI and other

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<sup>4</sup> *Right-touch regulation* CHRE 2010

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healthcare regulators will consider these in any further reviews of their legislative framework.

## 3. Executive Summary

- 3.1 The purpose of our review of the fitness to practise processes of ABA was to assist the NMBI to measure its past performance and identify areas for improvement and development. We have made a number of recommendations for change and development with regard to:
- formal guidance
  - quality assurance
  - performance management
  - operational improvements
  - decision writing.
- 3.2 In some cases we consider that the NMBI should prioritise this work. These recommendations are made based on our knowledge of best practice in the UK and the other international work we have undertaken. Our aim is to assist the NMBI, and others who read our reports, to continually improve their processes. In undertaking this work, we also seek to improve our own knowledge of regulation, in terms of best practice and approaches to regulation.
- 3.3 Overall we consider there is scope for the NMBI and its Fitness to Practise Committee members to improve its approach to the task of public protection. Whilst the work of the NMBI cannot be conducted in a vacuum, and we recognise that the members of the Fitness to Practise Committee are unpaid and often in full-time employment, members should avoid over-commitment on the day of a meeting; all members should engage in discussion about cases; and public protection should be at the heart of their work. In our paper "*Fit and Proper Governance in the Public Interest*"<sup>5</sup> we conclude that over-commitment by individuals to Boards and Panel membership (or by reason of one's day to day life) raises a risk that members will be unable to contribute diligently to the processes of scrutiny and decision making. As a result of our work in the UK, we concluded that those holding public office must approach the tasks before them with seriousness of purpose, probity and integrity as appropriate to their responsibilities. They must apply care, diligence and skill to all that they do in office, show respect and tolerance, listening and giving serious consideration to alternative positions. We also consider that further consideration should be given to training and development as well as appraisal. We acknowledge however that the NMBI understands the need for training on an on-going basis and will be introducing a system encapsulating this. We look forward to seeing the results of this work.
- 3.4 As well as individual performance management, we see there is urgent scope for the NMBI to understand and monitor the performance of the fitness

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<sup>5</sup> <http://www.professionalstandards.org.uk/docs/scrutiny-quality/130307-fit-and-proper-governance-in-the-public-interest.pdf?sfvrsn=0>

to practise function. The NMBI is aware of the delay in its processes but we do not consider that the Board understands how the organisation is performing or the reasons for the delay. The Board should expect to receive information about performance as opposed to process, it should ask itself whether it is receiving the right information and on the back of this set challenging performance standards.

- 3.5 We consider that the NMBI ought to give careful consideration to “taking a step back” from its day-to-day functions and with the assistance of this report look objectively at its operations with fitness to practise. The current structure of the operational team, whereby much of the operational work is focused on one individual, necessarily leads to delay. The Board of the NMBI must give serious consideration to the structure of the fitness to practise team and how best it can deliver its fitness to practise function. In order to progress cases whilst dealing with its historical backlog a new approach to internal operations is needed by the Board. It may wish to consider creating a team responsible for progressing the 1985 Act cases and a new team to deal with the 2011 Act cases. The adverse consequences of delay on public confidence in the NMBI, the system of regulation and most importantly public safety cannot be underestimated.
- 3.6 We set out our findings in full at section 6, but below we set out our recommendations.

#### **Formal Guidance**

- We consider that the NMBI should consider developing guidance specifically for employers taking into account the different focus of the concerns from an employment perspective.
- We would recommend that the NMBI review the employer’s guidance documents prepared by the UK regulators to assist in the development of its own document.
- We recommend that the NMBI also bring forward the development of guidance for registrants. We note that the NMBI has published helpful information in its newsletter about the fitness to practise process – we would recommend that information and style/tone of these articles are used as the basis for all future guidance documents.
- We would recommend that, in preparation for the new process brought in by the commencement of the 2011 Act, the NMBI develop an investigation manual which contains guidance for all staff setting out a clear indication of the nature of decision that can be made by different grades of the staff team, including clear criteria describing the categories of cases that can be closed by decision makers (if this applies). We consider that this manual should set out the process and procedures involved in fitness to practise investigations in clear plain English as well as including template documents to record decisions as well as standard letters.
- We recommend that the NMBI develop guidance for decision makers, to include the Chief Executive Officer (and whoever such powers are

delegated to), the Preliminary Proceedings Committee, the Fitness to Practise Committee and the Board, on their roles and responsibilities within the fitness to practise process.

- We would recommend that the executive consider developing a decision making template or process map for use by the Committee to improve the quality and consistency of their decisions.
- We would recommend that this Committee and the incoming Committee is given specific training on the importance of considering the public interest as well as how best to judge insight and remorse, which are factors relevant to sanction.
- We consider that the NMBI should enhance its training programme by introducing a formal appraisal and a mandatory induction and training scheme for the Preliminary Proceedings Committee, Fitness to Practise Committee and Board members.

### Language

- We consider that the NMBI should aim to have all its publicly available guidance documents developed according to the principles of plain English.
- We would recommend that the NMBI conduct a 'tone of voice' review of all its correspondence.

### Quality Assurance

- We recommend that the NMBI develop a system of quality assurance.
- We would recommend that the NMBI engage an independent third party, such as its own internal auditors or a law firm not engaged to represent the NMBI in fitness to practise work, to undertake a review of recent cases to assure itself that all decisions made are reasonable.
- We recommend that the NMBI consider creating a formal survey to assess satisfaction levels and to capture third party feedback in relation to its performance and also with regard to complainant contacts with patient support groups.
- We also recommend that the NMBI explore further the conclusions it has drawn from the data it has gathered in connection with concerns that certain ethnic groups were over-represented in the fitness to practise process.

### Performance Management

- We recommend that the NMBI urgently collate and review its case management data to identify all the sources of delay in order to address this issue in lieu of having a case management system.
- We would recommend that the Board give urgent consideration to developing key performance indicators to ensure that the new cases that will be considered under the 2011 Act do not suffer from undue delay.

- We recommend that the NMBI review the management reports created by UK regulators to provide guidance in approaching this task.

### Operational Improvements

- We recommend that the new Board and Executive give urgent consideration to our published paper *Fit and Proper? Governance in the Public Interest*
- We recommend a review of the process of scheduling a case as well as reinforcing to Committee members that their own availability is one factor in the organisation's ability to deal efficiently with cases.
- We would also recommend that the NMBI consider reviewing the fitness to practice process from a process or operations management perspective to come to a better understanding about the throughput of cases, the points where there is delay and how this can be improved.
- We would recommend that the NMBI look at those regulators who have undue delays with their processes as well as those who have developed an operating system which works efficiently, to learn from the experience of others.

### Decision Writing

- We would recommend that the Committee engage the assistance of its legal advisor in providing advice as to the level of detail required in the Inquiry report, with particular reference to the decision as to whether the registrant is guilty of professional misconduct and/or unfitness and sanction.
- We would recommend that the NMBI introduce a process whereby the Committee produces a written determination following each stage of the decision making process (that is in relation to facts, professional misconduct, sanction) or at the least on the day of the Inquiry (or last day, whichever is appropriate).

### Other

- We recommend that as part of its review of the recent recruitment process the NMBI note the value of a competency based interview
- We recommend that the NMBI considers developing a template complaints form to make the process of making a complaint easier for complainants.

## 4. The role of the Nursing and Midwifery Board of Ireland and the regulatory environment in Ireland

- 4.1 The NMBI regulates nurses and midwives. There are currently around 92,720 registered with the NMBI, of which about 25,840 are inactive registrants<sup>6</sup>.
- 4.2 The NMBI has five main functions, which are:
- to establish and maintain a register of nurses
  - to provide for the education and training of nurses and student nurses
  - to inquire into the conduct of a registered nurse on the grounds of alleged professional misconduct or alleged unfitness to engage in practice by reason of physical or mental disability
  - to give guidance to the profession
  - to manage the Nursing Careers Centre, which was set up in 1998 to facilitate a centralised system of processing and selection of applicants wishing to enter nursing; promote and market nursing as a career; provide careers information to registered nurses and midwives.
- 4.3 The overriding aim of NMBI is the protection of the public in its dealing 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. The Board is also required to do all things necessary and reasonable to further its object and to perform its functions in the public interest.<sup>7</sup>
- 4.4 The NMBI is a statutory body which is funded through Annual Retention Fees paid by each nurse and midwife registered with the Board. Administrative fees are also charged for other services provided.
- 4.5 The Board as established by the 1985 Act was made up of 29 members. Elected nurses and midwives made up the majority of the Board<sup>8</sup>. Only two members of the Board were lay members engaged to represent the general public interest.
- 4.6 The Fitness to Practice Committee has been in session since 2008, with many of the members serving their second five year term. The work of the Committee is required to continue and complete the management of complaints received under the former Nurses Act 1985 - this work is expected to continue for two years. The Committee comprises of 18 members, all of whom were members of the previous 28 member Board

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<sup>6</sup> Inactive registrants can be subject to fitness to practise proceedings despite being non practising registrants

<sup>7</sup> Nurses and Midwives Act 2011, section 8 and 9

<sup>8</sup> 17 members were elected and 12 appointed

which went out of office in October 2012 with the commencement of the Nurses & Midwives Act 2011. Board members were in full time employment either in the Public Sector (Health service Executive or Higher Education) or Private or Voluntary Sector.

- 4.7 The Board established by the 2011 Act comprises 23 members, with a lay majority of 12. Of the remaining 11 members, eight are registered nurses and midwives elected by the profession. A further three nurses and midwives are appointed by the Minister of Health. The legislation now defines that lay members are persons who have not and have never been registered nurses or registered midwives in Ireland or in another jurisdiction.
- 4.8 One of the major changes brought about by the 2011 Act is the introduction of a Preliminary Proceedings Committee. Prior to this the Fitness to Practise Committee considered both whether there was a case to answer and also whether, following an inquiry, the registrant was guilty of professional misconduct. This role has now been split – the Preliminary Proceedings Committee will consider the issue of whether there is a case to answer. The process is set out in more detail in the following section.
- 4.9 At the time of writing this report, the NMBI is currently recruiting members to the statutory committees of the Board, which include the Preliminary Proceedings Committee and the Fitness to Practise Committee.
- 4.10 The Preliminary Proceedings Committee will comprise 10 members of which four will be Board members. The Fitness to Practise Committee will comprise 24 members of which 8 will be Board members. Whilst the 2011 Act does not mandate the number of committee members for either, it does provide that the Committee must be made up as follows:-
- At least one third of the members, including the chairperson, shall be members of the Board
  - The majority of the members shall consist of persons who are not and never have been registered nurses or midwives
  - There shall be at least one nurse and one midwife on the Committee
  - At least one third of the Committee shall be registered nurses or midwives.
- 4.11 The general structure of the disciplinary process for healthcare regulators in Ireland is as follows:
- Investigatory Stage – the regulator will conduct initial investigations into the allegation before a committee will determine whether there is a prima facie case that should be referred to an inquiry committee
  - Inquiry Stage – the allegation will be considered at a formal hearing where the registrant and the regulator are represented; where evidence is heard and a report is produced which sets out whether the facts alleged have been proved; where the committee considers whether the facts are capable of supporting a finding of professional misconduct and/or unfitness to practice by reason of physical or mental disability. A recommendation is made as to sanction

- Decision on sanction – this will sit with the regulator in the form of the Board
  - Confirmation by High Court –the court will consider only those sanctions, other than when dealing with an appeal, where the sanction is one of erasure, suspension or the attachment of conditions. The decision is only effective once the High Court has confirmed it.
- 4.12 Under the 1985 Act all Inquiries before the Fitness to Practise Committee are in private. The increased awareness of the need for transparency on the part of the regulatory authorities has resulted in the transition to public hearings. Once cases are progressed under the 2011 Act, inquiries before the Fitness to Practise Committee of the NMBI will be in public. An application can be made by the registrant or a witness to have all or part of the inquiry held in private.
- 4.13 The statute does not contain any guidance as to the standard of proof to be applied. Consideration of this issue by the Courts has resulted in the application of the criminal standard to both stages of the decision making process. In the case of O’Laoire<sup>9</sup>, Keane J stated *“Under the scheme of the Act, no medical practitioner can suffer the grave penalty of erasure or suspension save by Order of this Court. Where the matter comes before the Court, as it does here, on the application of the practitioner to cancel the relevant decisions of the Committee and the Council, this Court is required to conduct an inquiry which... will conclusively and finally decide whether than penalty must be imposed. These procedures are laid down by the Oireachtas because of the manifest interest of the public in ensuring that the activities of persons in the medical profession are subject to strict control and that persons failing to observe accepted medical standards in relation to patients or colleagues are subject to effective sanctions. They are not of the same nature as private civil litigation”*. In the case of Grant<sup>10</sup> Murphy J stated that *“Whilst I am concerned as to the basis on which the criminal standard of proof has come to be applied to professional bodies in the exercise of their disciplinary functions I accept that that is the position and will remain so unless and until that the Supreme Court should otherwise direct.”*
- 4.14 The High Court in Ireland also plays a key role in the fitness to practise process. It is the High Court that will decide whether or not to impose an interim order, and where the final sanction in a case is one that is said to impinge on the registrant’s registration, then that decision does not take effect until confirmed by the High Court. The registrant also has the right to appeal a decision to impose conditions, to suspend or erase registration but in the absence of such an appeal the regulator must apply to the High Court to have the decision confirmed. During our review we have noted the important influence of the Irish Constitution in the fitness to practise process of the NMBI and the final outcomes. The Irish Constitution provides that only the High Court can impose sanctions which effect a citizen’s right to earn a living hence the additional layer of decision making which is not a part of the

<sup>9</sup> Unreported, High Court, Keane J, 27 January 1995

<sup>10</sup> Grant v the Garda Siochana Complaints Board and ors [1996] WJSC – HC 3617

UK model. The process itself has been developed taking into account the right to fair procedures which includes the requirement to give notice to a registrant of the complaint and to a full oral hearing.

- 4.15 Under the 1985 Act the strict publication provisions meant a complainant could not be told that a case had not been referred for an inquiry until the preparation process for the inquiry commenced.

## 5. Fitness to Practise Processes

- 5.1 The Fitness to Practise process that we reviewed was established by the 1985 Act. The 1985 Act created a Fitness to Practise Committee. That committee is the decision maker at two of the points of the process:

- to determine whether there is a prima facie case for an inquiry
- to hear that inquiry and make a recommendation to the Board.

- 5.2 The second decision maker in this process is the Board. Once the Committee has held an inquiry it produces a report which will be considered by the Board, at which meeting the recommendation will be accepted or rejected. The intent behind this layer of decision making is that it is the regulator which decides the appropriate sanction to be imposed.

- 5.3 The third decision maker is the High Court. If the decision of the Board as to sanction is erasure, suspension or the attachment of conditions, this decision must be approved by the High Court. There is a statutory right of appeal. An appeal, if lodged, may involve a full re-hearing of all the evidence in the case or legal submissions only

### Making a complaint

- 5.4 Under the 1985 Act the investigation process is initially triggered by receipt of an application for an inquiry into the fitness to practise of a nurse on the grounds of alleged professional misconduct and/or alleged unfitness by reason of physical or mental disability. Where a complaint is received which is not in the form of an application, ABA/NMBI will engage with the complainant to confirm whether a formal application is being made. Once the complaint is in the appropriate form, ABA/NMBI will undertake initial investigations before sending the complaint and evidence gathered to the nurse for their comments.

### Meeting of the Fitness to Practise Committee

- 5.5 The documentation gathered, including the response from the registrant is then presented to the Fitness to Practise Committee where it will consider whether there is a prima facie case for holding an inquiry. The Committee has the power to seek further information to assist it in making its decision.
- 5.6 At this stage of the process, the Committee is not a fact finding body; rather its role is to establish whether the substance of the allegation amounts to a prima facie case with a real prospect of the allegation being made out.

- 5.7 Where the Committee concludes that there is no prima facie case the Board will review the decision before the matter is formally closed. The Board may override the decision of the Fitness to Practise Committee that there is no prima facie case and direct that the Committee hold an inquiry.
- 5.8 Where the Committee concludes that there is a prima facie case, the case will be scheduled for an Inquiry before the Fitness to Practise Committee. Currently Inquiries are held in private but new allegations received after 1 October 2012 will, as a result of 2011 Act, be held in public. At the time of writing this report no hearings have yet been scheduled for public hearing.

### **Inquiry before the Fitness to Practise Committee**

- 5.9 Inquiries before the Committee take the form of a hearing; the Committee has the same powers, rights and privileges vested in the High Court in respect of enforcing attendance of witnesses and their examination on oath and compelling the production of documents. The role of the members sitting on the Inquiry is to establish the factual matrix and whether or not such actions amount to professional misconduct or unfitness.
- 5.10 The prosecution is brought on behalf of the CEO of the Board; the registrant is invited to attend and be legally represented. The registrant may make written submissions to the Committee in the absence of attending. Witness evidence in the form of oral or written testimony (where agreed by the parties) will be considered by the Committee and witnesses will be cross examined by both parties.
- 5.11 The standard of proof for establishing the factual matrix against which the other decisions will be made is the criminal standard; that is, beyond a reasonable doubt. When deciding whether the facts amount to professional misconduct the Committee also applies the criminal standard of proof. At the conclusion of the Inquiry, the Committee will produce a report in which it sets out its reasons for making findings of fact and whether the nurse is guilty of professional misconduct or unfit to practise by reason of physical or mental disability.
- 5.12 The Committee will also recommend what it considers to be the appropriate sanction. The sanctions available are to advise; admonish; censure a nurse in addition to or in place of conditions; suspension or erasure.
- 5.13 The decision is not announced in public at the Inquiry; rather it is made by way of a report which is provided to the CEO and the registrant.

### **Board Meeting**

- 5.14 The report of the Fitness to Practise Committee Inquiry is provided to the Board for its consideration, as well as the transcript of the Inquiry and the documents exhibited in evidence at the Inquiry. The Board will not hear live evidence about the index complaint. The Board must either confirm the decision of the Committee in whole or in part or decline to confirm the decision. If the Board is minded not to confirm the recommendation made by the Committee as to facts and misconduct/unfitness, the parties will be

invited to make further representations on this. If the Board confirms the findings then it will move on to consider sanction.

- 5.15 The CEO will not as a matter of policy make any submission as to the severity of sanction but will make more generalised submissions as to the purpose of sanction<sup>11</sup>. Under the 2011 Act the Board will only hear submissions as to sanction (when required). Again, the decision is not announced in public but notification is provided in writing to the registrant.
- 5.16 The Board Members who sat as the Fitness to Practise Committee at the Inquiry are not present when the Board considers the Inquiry report.
- 5.17 The Board will also consider the no prima facie cases and decide whether to confirm the decision of the Committee.

### High Court

- 5.18 The decision of the Board must be confirmed by the High Court where the sanction imposed is conditions, suspension or erasure. The registrant has 21 days within which to apply for cancellation of the decision (the equivalent of an appeal). The High Court can cancel the decision or declare the decision was proper and direct the Board to put in the place the relevant sanction.
- 5.19 If the nurse does appeal the decision, that appeal can be heard by way of complete rehearing or on the basis of legal argument.

### Interim Suspension

- 5.20 Where the Board considers that it is in the public interest to do so, it may apply to the High Court for an interim suspension order. This can occur at any point during the lifetime of the case. Prior to making this application, the Board will hold a meeting where it will consider whether to make such an application. The nurse concerned is entitled to attend and be represented at the meeting. The nurse (or her representative) can make oral submissions or present the Board with written submissions. Where applicable, the Board will notify the Director of Regulation of its decision and it is the Director who notifies the nurse.

### Indictable offence

- 5.21 Where the registrant has been convicted of an offence triable on indictment the case will be referred directly to the Board for consideration. An indictable conviction is not considered by the Fitness to Practise Committee at an Inquiry. However, whilst there is an on-going police investigation, the case remains within the jurisdiction of the Fitness to Practise Committee, insomuch as it will receive updates about the progress of the criminal investigation; where there is no conviction or decision to prosecute the case will be considered by the Fitness to Practise Committee at a meeting and

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<sup>11</sup> Some of the regulators we oversee will make submissions to the Fitness to Practise Panel as to the appropriate sanction to be imposed taking into account relevant case law and the organisations own Indicative Sanctions Guidance. These submissions in no way bind the Panel.

may be referred for an Inquiry. Under the 2011 Act, an offence triable on indictment will first be considered by the PPC.

## 6. Performance of the NMBI against our Standards of Good Regulation

6.1 As noted previously we have an established set of standards against which we assess the performance of the UK regulators. In order to assess the performance of the NMBI we have made minor amendments to these standards to reflect its legislation. We set out at section 9 the set of standards we agreed with the NMBI. In our review below we explain why the standard is necessary as well as assessing the performance of the NMBI.

**Anybody can raise a concern, including the regulator, about the fitness to practise of a registrant**

**The notification of complaints to the regulator should not be a complex process with unnecessary tasks or hurdles for complainants. As with every stage of the fitness to practise process it should be focused on protecting the public and maintaining confidence in the profession and system of regulation.**

6.2 Information about how to raise concerns about the fitness to practise of registrants is found on the NMBI website. Anyone can raise a complaint. The 1985 Act required not only that a complaint be raised but that the person also make a formal application for an Inquiry to ABA. The complaint and the formal application for an inquiry are required to be in writing. We are pleased to note that the 2011 Act does not include the unnecessary hurdle of making a formal application for an Inquiry.

6.3 If a member of the public wanted to find information about making a complaint this can be found on pages titled "Reporting Misconduct" and "How to make a complaint". There is also a page titled "Reporting Misconduct FAQs". We consider that the information is presented using language that is clear and concise but that the way the information is spread over the website means that the information is not contained in one location which could cause confusion. We consider that the FAQ section is especially helpful and reaffirms our view that the NMBI's approach to customer care is generally of a high level. Staff at the NMBI will also provide information via the telephone. From our interviews with the fitness to practise staff team we consider that they have a good understanding of the purpose of fitness to practise and their roles within the process, especially the need to be impartial and to be seen to be impartial.

6.4 We have been provided with NMBI draft guidance for complainants that will be issued once the new processes under the 2011 Act have been finalised. We consider that the draft complaints booklet is written in a user friendly way and is easy to follow. It explains the role of the NMBI, the purpose of the complaints process, the expanded grounds for complaint, how to make a complaint and the information that would assist the Committee considering the complaint, the role of the Preliminary Proceedings Committee and the process followed including the potential outcomes. We would recommend

that the NMBI considers developing a template complaints form to make the process of making a complaint easier for complainants.

- 6.5 Where a complainant has difficulty in formulating their complaint, the staff in the Fitness to Practise team will suggest that the complainant contact a patient support group. Where the complainant provides their consent, ABA would make a direct referral to the group to assist the complainant. We consider that this is good practice. The NMBI has told us that a file is opened and a written record is made of that referral to another body for assistance. These referrals will be followed up where possible to ensure that the complaint is progressed. The resources available to the NMBI are limited and this process assists the complainant in bringing a complaint. Whilst the effectiveness of this process falls outside of our remit, we consider that there may be merit in the NMBI assessing the satisfaction rate of this service, the time taken to formulate the complaint and whether or not this process ever results in complaints not being brought to the attention of the NMBI. Ultimately it is the responsibility of the NMBI to ensure all complaints are properly considered. Where the complainant has a mental health disability the NMBI has identified the need for expert assistance in understanding the complaint. We understand that with the assistance of the Assistant National Director for Mental Health Services in the Health Service Executive the NMBI has agreed that a Senior Regional Specialist in mental health can offer the complainant support. In our discussions with the NMBI we also understand that where a complaint cannot be progressed through this process, the NMBI may take steps to raise issues at a local level. For example, the senior manager at a care home may be advised that complaints were raised but the complainant was not able to identify the registrant.
- 6.6 The draft complaint booklet is aimed at any person who wishes to make a complaint. We have been told that the majority of complaints are made by employers; we consider that the NMBI should develop guidance specifically for employers taking into account the different focus of the concerns from an employment perspective. The guidance should amongst other matters set out when an employer should consider making a referral and explain the difference between employer and regulator concerns. We would recommend that the NMBI review the employer's guidance documents prepared by the UK regulators to assist in the development of its own document.
- 6.7 A further source of information for those wishing to make a complaint about a nurse or a midwife is the health complaints website. We consider this to be a very helpful source of information which clearly and concisely articulates the purpose of the website, how to complain about a health or social care professional, what information is available and that there is access to an advocacy service available to members of the public considering or in the process of making a complaint. One example of a guidance document we reviewed was marked with the "Plain English" mark – we consider that the NMBI should aim to have all its publicly available guidance documents developed according to the principles of plain English.

- 6.8 We understand from our interviews with staff that complaints are not screened out. In the absence of a case audit<sup>12</sup> we are unable to test whether complaints/concerns are screened out for unjustifiable procedural reasons in the day to day work of the team. Currently one senior member of staff has responsibility for assessing all complaints. The current structure of the operational team is being reviewed by the NMBI; this structure was developed when the 1985 Act was in place. Given the new legislation and the need to work under two different legislative schemes, we consider that there may be merit in creating different teams to action 1985 Act complaints and separately to 2011 Act complaints. This may prevent the 2011 Act complaints being subject to delays.
- 6.9 We understand that the NMBI is developing a compendium of all documents for users and beneficiaries of the NMBI. As part of this work, we would recommend that in preparation for the new process brought in by the commencement of the 2011 Act the NMBI develop an investigation manual which contains guidance for all staff setting out a clear indication of the nature of decision that can be made by different grades of the staff team, including clear criteria describing the categories of cases that can be closed by decision makers (if this applies)<sup>13</sup>. The importance of recording decisions and the reasons for actions or for no action should also be stressed. It may be the case that the current system will no longer be practicable with the expected increase in complaints.

**Information about fitness to practise concerns is shared by the regulator with employers/local arbitrators, system and other professional regulators within the relevant legal frameworks**

**We consider that a joined up approach to regulation and fitness to practise mitigates the risk to public protection which arises when regulators, employers and other local systems work independently of each other and in isolation. This collaborative working involves not only the sharing of information about particular individuals but also analysis of data to inform wider learning and policy development.**

- 6.10 The statutory framework within which the ABA operated has notification provisions which prevent the ABA (and now the NMBI) from sharing information with a third party once the formal fitness to practise process has commenced. This is undesirable. Therefore, there is no requirement to advise an employer that a registrant is under investigation. The 1985 Act goes so far as to prohibit the disclosure of this information. The framework also prohibited ABA from sharing information with the complainant. This is an approach which is shared by other regulatory bodies in Ireland.

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<sup>12</sup> A case audit was not part of the remit of this review

<sup>13</sup> For the purposes of this current review we have not undertaken a detailed analysis of the process and procedures to be followed under the 2011 Act.

- 6.11 The statutory notification provisions only apply once there has been a finding of professional misconduct and/or unfitness to practise by reason of health – in these circumstances a third party can be notified. However, because the decision of the Fitness to Practise Committee following the Inquiry has to be confirmed by the Board there will inevitably be a period of delay in this notification process.
- 6.12 Where the conclusion of the case is that the registrant is not guilty of professional misconduct and/or unfitness then there is no procedure within the legal framework for notifying the complainant. This has now been addressed within the 2011 Act. Under the 1985 Act procedures, the NMBI developed a policy whereby it sought the consent of the registrant to notify the complainant of the outcome of the case.
- 6.13 The recommendations of the recent Francis Inquiry in England have in part underlined the need for all regulators and employers to work in collaboration to assure the public interest. We are aware that this work is already being taken into account by our colleagues in Ireland and we welcome this.
- 6.14 We consider that generally further consideration should be given to the legal framework within which both the NMBI and other health and social care regulators operate. Employers play a significant role in ensuring that only those registrants who are fit to practise are employed to practise their profession. We have been told by the NMBI that the current framework does not permit this type of information sharing. We consider that in any future regulatory system in Ireland consideration should be given to alerting the employer and/or Health Service Executive that an investigation has commenced where the complaint is not triggered by an employer. This would allow the NMBI to share information in a two way exchange thus allowing the NMBI to place the reported misconduct in context.
- 6.15 We have seen evidence that ABA and now the NMBI takes an active approach to raising and taking forward fitness to practise cases itself. This often happens where a complainant does not wish to make a formal application for an inquiry. The NMBI have told us that:
- In 2010 there were 17 inquiries in which the Board was the applicant in seven
  - In 2011 there were 19 inquiries in which the Board was the applicant in two.
- 6.16 During the course of the Fitness to Practise Committee meeting we noted two cases where the Board was the applicant in the case.

**Where necessary, the regulator will determine if there is a case to answer and if so, whether the registrant's fitness to practise is impaired or, where appropriate, direct the person to another relevant organisation**

**The purpose of this standard is to assess the quality of the initial decision making process of the regulator. The aim of such processes should be to assure the public that action is taken against those professionals whose fitness to practise is impaired. We expect that**

**regulators have, amongst other things, guidance documents for decision makers, that staff record decisions clearly and the reasons for taking action or for taking no action, that there are tools to assist staff with investigative planning and that the regulator gathers sufficient, proportionate information to judge the public interest in proceeding/not proceeding with the investigation.**

- 6.17 In order to enhance the work of the NMBI we would recommend that it develop an internal operation manual for staff responsible for managing fitness to practise complaints. We consider that this manual should set out the process and procedures involved in fitness to practise investigations in clear plain English as well as including template documents to record decisions and standard letters. We have developed a fitness to practise casework framework in partnership with the UK regulators we oversee which we consider would be a helpful starting point. During the course of our review, we noted a clear appetite for such guidance from staff.
- 6.18 We recommend that the NMBI develop guidance for decision makers, to include the Chief Executive Officer (and whoever such powers are delegated to), the Preliminary Proceedings Committee, the Fitness to Practise Committee and the Board, on their roles and responsibilities within the fitness to practise process. Such guidance will ensure consistency, fairness and that the decisions reached are robust.
- 6.19 We have seen detailed documents setting out the procedure of the various decision making bodies at the NMBI and note that these documents are also provided to the registrant. We consider that the documents could be used to form the basis of the guidance we recommend if the contents were set out in plain English. The current documents use language which mirrors the text of the legislation which results in documents which appear complicated and difficult to follow. Whilst we are conscious of the formal legal process which governs fitness to practise investigations, the development of guidance documents using plain English can only serve to improve the understanding of registrants and other stake holders and will not detract from the seriousness of the process.
- 6.20 As mentioned above, one staff member is currently responsible for identifying the information that is required before a case is considered by the Fitness to Practise Committee at a meeting. We consider that because of the change in the way complaints/concerns are to be processed this may result in an increase in workload. In advance of any potential backlog, we consider that in the absence of a case management system, tools for investigative planning should be developed to assist and enhance the work of the staff team in identifying the key issues, the documentary evidence that is required and to manage and prioritise time frames. We note that once a case is referred for an inquiry and allocated to external solicitors a case preparation plan is used to set out the key information required. This could form the basis of the investigative planning tool for staff. Given the NMBI's own concerns about the timeliness of case progression (see paragraph 6.47) this approach may assist staff in increasing the throughput of cases.

6.21 The staff team at the NMBI has access to a professional advisor who can assist in identifying the issues in a complaint relating to clinical competence and who also assists the external lawyers in obtaining witness statements. We consider that providing staff with access to appropriate expert advice where necessary is a valuable resource.

6.22 We note that the 2011 Act has a provision which increases the scope of the power to request information which was not available to NMBI under the 1985 Act (it was the case that the power rested with the Fitness to Practise Committee hearing an Inquiry).

**All fitness to practise complaints are reviewed on receipt and serious cases are prioritised and where appropriate referred for consideration under S58 of the 2011 Act/S44 of the 1985 Act**

**Robust risk assessment both on receipt of a new case and on receipt of further information is necessary to enable the regulator to assess: what action should be taken; and the priority with which the case should be treated. In some circumstances the regulator may need to take immediate action on receipt of a complaint/further information. Such action could mean applying for an interim order to prevent the registrant from practising unrestricted while the matter is under investigation. We have already noted that the ability of the NMBI to share information with others is restricted by the legislation; however in circumstances where this is not an issue, we would also expect to see the regulator sending information to other interested bodies.**

6.23 Interim orders can be imposed by the High Court under S58 of the 2011 Act (s44 of the 1985 Act). The legislative framework requires the Board of the NMBI to be satisfied that there is a public interest in applying for an interim suspension order before making an application for the same at the High Court.

6.24 Where a complaint or additional information is received about a case, NMBI staff will review it to determine whether there are any immediate public safety concerns. We are pleased to note that the NMBI has a process in place for assessing risk throughout the lifetime of a case (this is a process that was in place previously). Where a concern is identified, the Chief Executive and Chair of the Fitness to Practise Committee are notified in order to decide whether the case should be considered by the Board. The case is considered either at a special meeting of the Board or at one of the scheduled Board meetings. We note that this process of timetabling special board meetings is used to mitigate against unnecessary delay. We note however that the quorum for these meetings is six and given the reported concerns about ability of Board members to commit time to the NMBI whilst undertaking their usual employment, consideration ought to be given to whether the quorum can be changed in the future. We were assured by the NMBI that the risk we highlight has not occurred in practice.

6.25 A process akin to a hearing will take place before the Board – as a result of that formal notice of the meeting is given to the registrant (minimum of five days) as well as being given the opportunity to attend the meeting; have a

legal or other representative present; make either oral or written submissions to the Board. Once the meeting has concluded the Board will adjourn to begin its deliberations; during the course of its deliberations the Board may clarify any matter with the Director of Regulation in relation to the implementation or administration of any decision it makes. The Board will inform the Director of Regulation of its decision first and it is the responsibility of the Director of Regulation to inform the nurse both verbally and in writing of the decision within 48 hours (we note that this has been increased to three days in the procedure document for the 2011 Act). The Board meeting is held in private (as are all meetings/inquiries under the 1985 Act).

- 6.26 We have been told that one member of staff is tasked with reviewing new information. In the absence of a case audit we cannot comment about the effectiveness of this process but would urge the NMBI to consider sharing this task within the team to process such matters in a speedier way. In light of our recommendation about the structure of the team and in the absence of an internal operations manual for staff, there is a risk that identification of serious cases may not be consistent. We have been told that the NMBI has applied for and obtained interim orders or agreed undertakings in relation to cases where the registrant has stolen money from a patient; there is evidence of a drug or alcohol dependency; stolen drugs in order to supply others; physically or sexually abused patients or where there has been on-going concerns regarding an individual's competence or behaviour and the process at a local level has not been successful.
- 6.27 We have been told that the NMBI will only refer cases for consideration of interim suspension where the likely sanction is one of erasure. This is as a result of case law (*o'Ceallaigh v ABA*<sup>14</sup>). In the absence of indicative sanctions guidance for decision makers we consider that there is a risk that the identification of such cases may lack consistency.
- 6.28 Whilst we again acknowledge the legislative framework within which ABA operated we are concerned that the process for obtaining an interim order is overly complex and there is duplication of decision making by the Board and the High Court. We consider that some consideration should be given to simplifying the process in order to reduce the period of time before an order can be imposed so that the public are protected. The NMBI have told us that it can take around 10 days before a court date is set.
- 6.29 During the course of our meetings with Committee members<sup>15</sup> we noted the repeated use of the phrase that interim orders were considered by the Court to be "draconian". We were concerned that the import placed on the statements of the learned court may discourage the Board to refer cases to the High Court. This was reinforced by the absence of any discussion about the effect of such orders; that is that they would prevent a nurse or midwife who presented a real risk to members of the public from continuing to do so. Although we did not attend a meeting where an application for an interim

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<sup>14</sup> [2000] 4 IR 54

<sup>15</sup> Under the 1985 Act, the Fitness to Practise Committee Members were also Board Members

order was being considered, we have been told that the public interest is a matter that will be given consideration.

- 6.30 We welcome the approach taken to agree undertakings not to practise with registrants. These are published on the public register on the website; this approach has been developed because of the high threshold for obtaining an interim order.

**The fitness to practise process is transparent, fair, proportionate and focused on public protection**

**The purpose of this standard to assess how the case management system/processes enables the collection and analysis of reliable data to ensure that there is no bias in the process, with evidence of this testing being carried out by the regulator. This standard also focuses on evidence of the appointment and appraisal process for committee members, panellists and advisors to fitness to practise cases. We consider that it is important that relevant training, guidance and feedback is provided to Committee members, panellists and advisors to fitness to practise cases.**

- 6.31 Under the 1985 Act the ABA did not have majority lay representation on its Board; this has been addressed by the 2011 Act (see paragraph 4.6 above).
- 6.32 We raise below our concerns that the composition of the Fitness to Practise Committee (considering cases at the meeting) appears to have affected the quality of the decision making because of its focus on the registrant and not the patient/public interest. In our reports on others, we have commented that where the composition of the decision making group does not have a lay majority it can result in a perception that the profession is looking after its peers, rather than focusing on the protection of patients and the public; this may have the effect of discouraging genuine complaints. In much of our work, we have observed and recommend that all regulators recognise that public confidence is vital to their effectiveness as a regulator and the system of regulation. In our discussions with the NMBI we are pleased to note that it is giving further consideration to how it can embed patient/public interest in its decision making.
- 6.33 We note that the NMBI is part way through its processes of appointing members to the Fitness to Practise Committee and the newly formed Preliminary Proceedings Committee following the commencement of the 2011 Act. At the time of writing this report, the new Board has been appointed through a process of election and appointment by the Minister.
- 6.34 The Preliminary Proceedings Committee which is replacing the Fitness to Practise Committee as the initial decision maker will be made up of both Board and non-Board members. Again, at the time of writing this report the process for appointing the non-board members is on-going. Individuals were able to apply for this position by making an application using the public appointments service following which the appointments committee of the Board assessed the applications and appointed members. There was no interview process. We consider that having an interview would have been

valuable as it would have enabled the appointments committee to test the competencies of the applicants. We recommend that as part of its review of the recruitment process the NMBI note the value of a competency based interview. We acknowledge that the NMBI took advice on the process it followed on this occasion. We have in our paper, *“Fit and Proper? Governance in the public interest”*<sup>16</sup> stated that recruitment and appraisal processes have a role to play in ensuring the quality of individuals. During our meetings with members of the Fitness to Practise Committee (who were also members of the previous Board) some common themes were raised around minimal and inadequate induction to the role and a lack of a formal programme of training or appraisal. We observed that attendance at a conference was offered to members of the Fitness to Practise Committee but noted that this was not mandatory and would not have addressed any specific training needs particular to the roles and responsibilities associated with being a member of the Fitness to Practise Committee. We also noted that the members we interviewed were complimentary about the support and guidance offered to them by senior members of staff.

- 6.35 We also observed some general feedback being given to the Committee which we considered to be relevant to our assessment of the NMBI’s approach to training and development. At the meeting we attended, the NMBI referred to a matter that had been raised in a hearing which it considered ought to be shared with the wider Committee in order to underline good practice in this particular area. However, we considered the approach adopted by the NMBI in sharing this information was too generalised and did not focus on the needs of individual committee members in their learning and development.
- 6.36 We consider that the decision making structure of the NMBI also necessitates the need for annual appraisals. Concerns were raised by those we spoke to that the ‘final’ decision as to the outcome of a fitness to practise Inquiry rests with some members of the Board who have no direct experience of fitness to practise or the inquiry process. Concerns were raised with us that the members without appropriate skill and knowledge may not understand the conclusions set down in the Inquiry Report. We consider that this is a real risk because of our concerns around the system in place, the lack of induction, training and appraisal.
- 6.37 We consider that the NMBI should enhance its training programme by introducing a formal appraisal and a mandatory induction and training scheme for the Preliminary Proceedings Committee, Fitness to Practise Committee and Board members.
- 6.38 The concerns we refer to above could in part be addressed by a system which allows the NMBI to quality assure its decisions. There is no quality assurance process currently. We consider that having a system of quality assurance in place is a necessary requirement for all regulators. The details of the process are a matter for the regulator itself taking into account relevant

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<sup>16</sup> <http://www.professionalstandards.org.uk/docs/scrutiny-quality/130307-fit-and-proper-governance-in-the-public-interest.pdf?sfvrsn=0>

risk factors associated with those it regulates as well as the processes/procedures it operates. We have recommended that regulators should ensure that they have a proportionate system of quality assurance in place that enables the review of cases that have reached key decision points (such as decisions about whether to impose an interim order, decisions taken at the end of the investigation stage and decisions taken by the final Panel) to ensure that procedures are being followed consistently and that appropriate decisions are being made. We believe that such quality assurance drives continuous improvement and provides assurance to the Council or Board and members of the public about the quality of the regulators work. We therefore recommend that the NMBI develop a system of quality assurance.

- 6.39 We were pleased to note that the induction training provided to the new Board members was more comprehensive as to process and procedure; it covered the role and purpose of Board, how to approach the decision on sanction; how to approach the decision on whether an interim order is required and legal concepts such as natural justice and bias. We consider that further training should be provided to all decision makers following the publication of this report and that it should focus on good decision making. On-going training should focus on learning from the work of the NMBI including appeals to the High Court, reviews of complaints and completed cases amongst other things which should be identified by the executive and decision making committees together.
- 6.40 We also recommend that the NMBI explore further the conclusions it has drawn from the data it has gathered in connection with concerns that certain ethnic groups were over-represented in the fitness to practise process. Whilst we respect and understand the decision not to publish this data, it appears to us that a legitimate concern was raised and that the NMBI has a part to play in addressing these issues or at least formally raising this with those organisations better placed to address such matters whether that be the Health Boards or the Department of Health.
- 6.41 Within this standard, we also consider what efforts the regulator has undertaken to meet the individual needs of parties to the fitness to practise process, particularly those who are vulnerable. We have been told that the FTP staff team seeks to identify witnesses who require particular support. The Fitness to Practise Committee Inquiry is a private hearing and as a result should a witness require a supporter the Committee must agree to the witness being accompanied by a supporter. We consider that the approach taken by the staff team to supporting witnesses is good practice. The witness information leaflet has recently been revised taking into account views of relevant stakeholders as well as reviewing other national and international publications; on the morning of an inquiry witnesses are taken on a tour of the inquiry room and process explained to them; regular updates are provided to witnesses during the course of the day; there are sufficient meeting rooms to offer separate spaces to witnesses if any issues/conflict arises. We are aware that the staff team has received letters of thanks from witnesses. The NMBI has shared with us work undertaken by the previous Chief Executive of ABA on Professional Self-Regulation and the Public

Interest. In that extensive piece of work the views of union leaders, nurses in employment, leaders of patient representative associations and patient representatives were obtained.

- 6.42 In order to develop the good work in this area we recommend that the NMBI considers creating a formal survey to assess satisfaction levels and to capture third party feedback. We note that the NMBI created an electronic voting system for the recent board appointments – we consider that it could use its expertise to develop an electronic survey to capture not only feedback from witnesses but also complainants and registrants involved in the fitness to practise investigation to improve its practice or to provide objective evidence as to the standard of its customer service.
- 6.43 We have been told that the staff team would inform the Committee in the presence of the Legal Assessor in advance if a particular witness has a particular vulnerability such as a recent bereavement or is feeling nervous or unwell. We consider that identifying such issues is commendable and that sharing this information in the presence of the Legal Assessor reinforces the separation of functions and transparency of the investigation and adjudication process.

**Fitness to practise cases are dealt with as quickly as possible taking into account the complexity and type of case and the conduct of both sides. Delays do not result in harm or potential harm to patients and service users. Where necessary the regulator protects the public by means of interim orders**

**Delays in the progression of cases are not in the interests of complainants, registrants, employers or the public. As we have commented in other work we have done, undue delay in the fitness to practise process can have a negative impact on the reputation of a regulator and public confidence in the system of regulation.**

- 6.44 We recognise that in those cases being investigated by another agency such as the police, delay is unavoidable. At the meeting we attended we noted that the Committee was updated about a number of cases where there was a police investigation on-going. We were pleased to note that whilst the standard process was to await the outcome, the Committee was advised that there was one case where the NMBI would give consideration to bringing fitness to practise proceedings before the closure of the police investigation given the length of the investigation by the police and the likely outcome.
- 6.45 We also recognise that public services in Ireland are subject to recruitment moratoriums and financial restraints and as such this has an effect on resourcing.
- 6.46 The NMBI has told us that the historical delays in the fitness to practise process can be attributed to the complexity of case preparation; difficulties in sourcing documents even with a production order; staff resources; availability of committee members; and legal challenges.
- 6.47 On reviewing the statistical data provided to the Board of ABA we noted that there can be a delay of between two to three years between the decision to

refer a case for an inquiry and the inquiry itself. By way of example, in a report to the Board for a meeting in March 2012, it was noted that there were 42 inquiries pending of which eight cases were referred in 2009 and 16 cases in 2010. We observed one case at a fitness to practise inquiry which was a relatively straightforward allegation that had previously been investigated by the registrant's employer. We also noted that the registrant had made admissions from an early stage at the local investigation. The complaint was considered by the Fitness to Practise Committee and referred for a hearing in June 2010; the notice of inquiry was not sent to the registrant until February 2013. There does not appear to have been any valid reason for the delay. We have also had the opportunity to review transcripts of cases which have been concluded, i.e. a sanction has been imposed which has been ratified by the High Court. In one case we noted that the allegation which gave rise to the complaint took place in December 2008 but the hearing did not take place until September 2011. Given the concerns raised by the Chief Executive and members of the Fitness to Practise Committee, and our own review of the limited data provided by the NMBI we consider that the cases we have seen are indicative of the failure of ABA to deal with cases efficiently.

- 6.48 Whilst there has been a period of time where the NMBI was without a formal Board this was relatively recently and does not explain delays of, in some cases, a period of years. We understand from talking to stakeholders that substantial delay has been a part of the fitness to practise process for several years. We would urge the NMBI to take steps to address this issue; important first steps are being taken but the scale of the problem must not hinder the willingness to address it.
- 6.49 One concern raised by the NMBI was in relation to the availability of Committee Members; a review of the process of scheduling a case as well as reinforcing to Committee Members that their own availability is one factor in the organisations ability to deal efficiently with cases is recommended. The same consideration also applies to the scheduling of cases at Board meetings. We consider that one possible solution would be to develop a formal hearings calendar where certain weeks are blocked out for hearings many months in advance. This would allow those involved to organise their diaries more effectively. Another possible solution is the introduction of a formal case management process following the decision to refer a case for an inquiry. We acknowledge that the NMBI is alive to this issue and we urge the NMBI to prioritise this recommendation in order to ensure that the delays of its predecessor are not carried over into its work.
- 6.50 We would also recommend that the NMBI consider reviewing the fitness to practice process from a process or operations management perspective to come to a better understanding about the throughput of cases, the points where there is delay and how this can be improved. This could be undertaken in conjunction with the structural review of the team. A review of this nature could contribute towards a more effective fitness to practise process where delay is minimised. The development of a protocol between the NMBI and the main defence body was a suggestion that was welcomed.

Given this appetite to engage with the development of the new procedures we consider that the NMBI should make efforts to positively engage in this.

- 6.51 Until such a review takes place, we would recommend that the NMBI urgently collate and review its case management data to identify all the sources of delay in order to address this issue in the interim. This may also assist the NMBI running cases under two legislative schemes.
- 6.52 We have been told that ABA did not have key performance indicators in place in relation to its fitness to practise function. We would recommend that the Board of the NMBI gives urgent consideration to developing such indicators to ensure that the new cases that will be considered under the 2011 Act do not suffer from undue delay.
- 6.53 We also consider it vital that the executive and the Board develop a reporting process which will allow the Board to scrutinise the work of the Fitness to Practise function. The reports we refer to here are distinct from individual case reports where the Board will consider the appropriate sanction to impose. We have been told that historically the ABA Board was only provided with data once a year in the form of the annual report. At two of the meetings which took place in 2012, the Board was provided with an activity report from the Fitness to Practise department; activity reports were not considered at the other two meetings that year. We consider the current system of activity reporting can be enhanced in order to ensure the report is tool for measuring the effectiveness of the department. We recommend that the NMBI review the management reports created by UK regulators to provide guidance in approaching this task<sup>17</sup>. The NMBI should pay special attention to those areas of the process where there are delays and provide the Board with this information. In our strategic review on the Nursing and Midwifery Council we have stressed the importance of performance data/management information. This data will allow the Board to set the strategic direction of the organisation and identify how best to allocate the organisations resources<sup>18</sup>.
- 6.54 We are conscious that the NMBI does not have a case management system in place at this time but given the caseload we consider that it is able, in the absence of such a system, to create an interim reporting mechanism from which it can obtain key information. We would recommend that the NMBI look at those regulators who have undue delays with their process as well as those who have developed an operating system which works efficiently to learn from the experience of others.
- 6.55 We also understand that NMBI is planning to introduce a case management system. An effective case management is one of the key factors in an efficient fitness to practise process. NMBI (and previously ABA) relies on a system of manual collation of data through various word documents, excel spread sheets and diaries. The current trend for the NMBI appears to be an increase in complaints and inquires; we consider that the 2011 Act will result in more complaints given the removal of the “application for an inquiry”

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<sup>17</sup> For example the GMC and HCPC.

<sup>18</sup> <http://www.professionalstandards.org.uk/docs/special-reviews-and-investigations/chre-final-report-for-nmc-strategic-review-%28pdf%29.pdf?sfvrsn=0>

hurdle. We therefore consider that investment in a fit for purpose system is warranted. The NMBI should engage with staff in the development of the specification because it helps to ensure that the system is user friendly and has staff “buy-in”. We understand the new system will generate reports and files will be able to be flagged for action.

**All parties to a fitness to practise case are supported to participate effectively in the process**

**Good customer service is important in maintaining professional and public confidence in a regulator. Effective involvement of all parties in the fitness to practise process increases trust and confidence in the process of regulation as well as facilitating the smooth progression of cases and reducing stress for complainants, witnesses and registrants.**

- 6.56 We have already referred to the guidance that is produced for witnesses and the draft guidance for complainants. We recommend that the NMBI also bring forward the development of guidance for registrants and consider developing guidance for employers. We note that ABA published helpful information in its newsletter about the fitness to practise process – we would recommend that information and style/tone of these articles are used as the basis for all future guidance documents.
- 6.57 We consider that on the basis of our observations and discussions with the NMBI the staff in the Fitness to Practise Department have a good understanding of the importance of customer service in their work. We have noted the care with which witnesses and a registrant was treated during the day of an Inquiry; the NMBI aims to send written letters of thanks to witnesses; and provides a familiarisation tour on the day of the hearing.
- 6.58 We have only had a limited opportunity to review the written correspondence generated by the department. Whilst we felt that the message in these letters could be understood, we would recommend that the NMBI conduct a ‘tone of voice’ review of all its correspondence. The language it currently uses is very formal and legalistic. We are aware that other health and social care regulators who have conducted similar reviews have found that a change in tone can be beneficial in terms of improved understanding of the message contained in the letter. We do not consider that any change in tone would in any way undermine the image of the NMBI as the statutory regulator for nurses and midwives in Ireland.

**All parties to a fitness to practise case are kept updated on the progress of their case within the relevant legal framework**

- 6.59 We refer above to the notification provisions set out in the 1985 Act. In order to enhance its performance against this standard we consider that the NMBI should give consideration to setting itself challenging targets as to timeframes for those cases that will fall under the 2011 Act. We consider that the setting of such timeframes improves customer service. We also consider that in relation to the current caseload, once a timetable for the outstanding inquiries and Board meetings is set, the NMBI actively advise all registrants and witnesses of the proposed listing of their case as a matter of urgency.

6.60 We note that there has been a welcome transition in relation to the ability of the NMBI to keep a complainant updated as to the progress of a case. Under the 2011 Act, the Preliminary Proceedings Committee shall make reasonable efforts to ensure that a complainant is kept informed of all decisions of the Preliminary Proceedings Committee and Fitness to Practise Committee.

**All fitness to practise decisions made at the initial and final stages of the process are well reasoned, consistent, protect the public and maintain confidence in the profession**

**Providing detailed reasons for the decisions that are taken and ensuring that those reasons clearly demonstrate that all the relevant issues have been addressed, is essential to maintaining public confidence in the regulatory process. Requiring decision makers to provide detailed reasons also acts as a check to ensure that the decisions themselves are robust.**

6.61 We have had an opportunity to observe the Fitness to Practise Committee at a meeting (initial stages decisions); the Fitness to Practise Committee at an Inquiry; review the transcripts of five cases considered at the Inquiry and Board stages, as well review five reports of an Inquiry and review the outcome letters in five cases. We have been able to observe how the Committee approached its decision making at a meeting; including what matters it took into consideration, how it evaluated the information before it and whether it considered the need for more information/advice. We were not able to assess whether the Committee addressed all the allegations before it or identified new issues because we did not undertake a case audit.

6.62 We consider the determinations at each stage of the decision making process could be improved. Given the strict limitations around publication we will not refer to specific cases below but will raise general points for consideration and review. We make our comments in light of the change to a public inquiry process, and acknowledging that not all decisions are published, but also because we consider the registrant (as well as the complainant) has a right to understand how their case has been decided.

6.63 We consider the NMBI should review our comments and incorporate them into the on-going training for the newly appointed committees.

#### ***Decision making and the public interest***

6.64 We acknowledge that our conclusions are based on limited observation however we judge that our observations are indicative of the general approach of the Committees. Whilst we do not seek to come to any conclusion as to the reasonableness or otherwise of the decision making we witnessed, we had overriding concerns that the Fitness to Practise Committee did not make any express reference to patients, patient safety or acting in the public interest during the meeting and Inquiry we observed. We were concerned that in the absence of any guidance on how to approach the task before them, the Committee did not always place sufficient weight on the concerns raised by the complainant. On several occasions however

committee members expressed concern for the nurses involved but not for the patients. We also concluded that this may be as a result of the substantial majority of professional representation on the Committee and a lack of explicit focus on patient safety.

***Decision making at a meeting of the Fitness to Practise Committee.***

- 6.65 We noted that on two occasions, the Committee made disparaging comments; first about the way a complaint was written and second it made assumptions about the motivation of the complainants; whilst we do not come to any conclusion as to whether this affected the appropriateness of the decision, there is a risk that this affected the seriousness with which the Committee approached the complaint and/or that the decision making was not objective.
- 6.66 In our interviews with Committee Members, we noted that when describing the decision making process they referenced the need to take account of the patient perspective, however generally we did not see this translated to the meeting.
- 6.67 Whilst the governance of the NMBI is outside the remit of this report, we do have significant concerns (which were echoed by some of those we interviewed) about the number of Committee Members who attended only part of the meeting and left before its conclusion; there were only 13 of the 18 members remaining following the lunch break. This has a negative effect on the consistency of decision making as well as raising issues about quorum. This is particularly important given the number of members who absented themselves because of a conflict of interest. Given the issues around delay already identified, we consider it possible that the issues around quorum may result in cases being adjourned for this reason which we do not consider to be acceptable in modern regulation. We recommend that the new Board and Executive give urgent consideration to our recently published paper *Fit and Proper? Governance in the Public Interest* which deals with these matters.<sup>19</sup> It is clear from our discussions that the NMBI executive understands the importance of on-going training and appraisal and we look forward to seeing the effect of the same in the future.
- 6.68 Whilst we raise a number of concerns in relation to this standard we are unable to conclude whether or not the issues we note have resulted in decisions which have exposed the public or the confidence of the NMBI as a regulator to risk. We have referred above to quality assurance; given the concerns we have raised, we would recommend that the NMBI engage an independent third party, such as their own internal auditors or a law firm not engaged to represent the NMBI in fitness to practise work, to undertake a review of recent cases to assure itself that all decisions made are reasonable.
- 6.69 We were concerned that in one case sufficient members of the Committee supported a proposal, which was therefore carried forward, to seek a further

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<sup>19</sup> <http://www.professionalstandards.org.uk/docs/scrutiny-quality/130307-fit-and-proper-governance-in-the-public-interest.pdf?sfvrsn=0>

response from a registrant who had already provided the Committee with their response to the allegations. The Committee appeared to be seeking a more focused response from this registrant which would have allowed them not to proceed with an inquiry. On reviewing the papers, we did not consider the allegation to be so complex that the registrant could not understand the allegation; we also noted that the registrant had been subject to an internal investigation. We concluded that on the basis of the information before them and taking into account the outcome of the internal investigation, the registrant had made an informed decision to respond in the way that they did. We also noted that the Committee made some comments which were not relevant to their role and responsibilities. Whilst the Committee is able to seek further information before making a decision in a case, in this instance we concluded that the Committee's decision was concerning. We consider that this is an example of a case where a majority of the Committee put the registrant's own interests before the public interest. Whilst this proposal was upheld, we did note that it caused debate and was controversial within the Committee.

- 6.70 We also observed at least three case discussions where the Committee commented that the registrant had provided a 'robust response' without expanding on what this meant. In our view limited discussion of cases can lead to poor decision making.
- 6.71 One of the main functions of our work in the UK is to review the decisions produced following the conclusion of a fitness to practise hearing; we also audit a sample of cases which have not been referred for a hearing. One of the main areas of our focus is the quality of decision making. We have published a learning points bulletin which highlights our views on how a determination should be written. In our view a good determination should be a standalone document which can be clearly understood by all audiences. It should set out a description of the allegations, an explanation of why particular allegations were or were not found proved, an explanation of any important background facts which led the Panel to its conclusion, and an explanation of why a specific decision was reached.
- 6.72 We consider that the NMBI should consider how to improve the level of discussion and better capture the reasons which flow from the discussion of whether or not to refer a case for an inquiry. Currently whilst in transition this role is fulfilled by both the Fitness to Practise Committee and shortly the Preliminary Proceedings Committee. The decision should capture the complaint considered and why the committee concluded there was sufficient cause to warrant an inquiry. In one case we considered the decision letter to the registrant said 'The Committee at its meeting on [date] has decided that there is a Prima Facie case for holding an Inquiry into your fitness to practise nursing on the grounds of alleged professional misconduct' without any further explanation.
- 6.73 We consider that the process could be improved if cases are allocated to specific committee members to lead the discussion and explicitly to consider the impact on the patient concerned (as well as the patient group as a whole). We would encourage all members to engage in the discussion. We

would recommend that the executive consider developing a decision making template or process map for use by the Committee to improve the quality and consistency of their decisions.

- 6.74 We are also concerned that the registrant is not notified of the details of the case against them until they receive the notice of inquiry; from the date of service the registrant then has four weeks to prepare their case. If the decision of the Fitness to Practise Committee explained in detail the nature of the case that was being referred, then it would be possible for the registrant to begin to prepare their defence. This current situation could result in delays as the registrant may need to request an adjournment and given the scheduling process operated by the NMBI there may be increased difficulty in identifying a suitable date for the hearing. See also our comments at 6.49 above.

***Decision making at an Inquiry before the Fitness to Practise Committee.***

- 6.75 We are grateful to the registrant and their representative and the Committee for allowing us to observe the inquiry.
- 6.76 We noted that the Committee did not ask the registrant or witness any questions about the effect of the registrant's behaviour on public confidence in the profession - this was in our view a key issue in this case as it centred on personal behaviour as opposed to clinical competence. We would recommend that this Committee and the incoming Committee is given specific training on this issue as well as how best to judge insight and remorse which are factors relevant to sanction. We have been told that one way the Committee judges this aspect is to ask an past employer whether they would re-employ the registrant; whilst this may be an issue upon which the panel are entitled to place some weight, we would remind the Committee and the Board that the decision as to whether the registrant should be able to practise without any form of restriction has been vested in them.
- 6.77 We would also recommend that the Committee engage the assistance of their legal advisor in providing advice as to the level of detail required in the Inquiry report with particular reference to the decision as to whether the registrant is guilty of professional misconduct and/or unfitness and sanction. In one case we considered the decision of the Inquiry was set out as follows: 'The Board, having confirmed the report of the Fitness to Practise Committee of An Bord Altranais, has decided that your name should be erased...The reason for the Board's decision is that you have been found guilty of professional misconduct ...' without any further explanation. Whilst we have seen more recent reports of 'no prima facie' decisions which contain a little more detail, we consider that there is still room for these decisions to be improved. Whilst the NMBI has no control over whether a registrant may or may not appeal a decision taken following a fitness to practise inquiry, where the decision is supported by detailed explanation the possibility of a reasonable decision being overturned is likely to be reduced. We have been told that the NMBI has moved to increase the level of detail in such letters. We would encourage the NMBI to develop their work in this regard.

- 6.78 We have been told that the approach the Committee takes to sanction will follow a stepwise approach. We consider that this should be reflected in the Inquiry report. This not only ensures that the Committee recommends a proportionate sanction, it is an approach which allows the Committee to test its decision and importantly it will provide assistance to the Board when it comes to consider the Inquiry report.
- 6.79 We were concerned that in one case we reviewed, in its decision on sanction, the Committee stated that it had taken into account the lack of participation by the registrant and failure to provide alternative contact details when making a decision to erase the registrant. In another case, where certain facts were not found proved the decision was not explained.
- 6.80 We have been provided with the draft report in connection with the hearing we observed. We were encouraged to note that this decision document contained a more detailed explanation of the reasons why the Committee reached the decision that it did.
- 6.81 We note that although the Committee reaches a decision on the case at the conclusion of the Inquiry, the final written decision of the Inquiry is not produced on the day; rather the Committee will take around three weeks to produce a written document which is then circulated to the relevant parties<sup>20</sup>. We would recommend that the NMBI introduce a process whereby the Committee produce a written determination following each stage of the decision making process (that is in relation to facts, professional misconduct, sanction) or at the least on the day of the Inquiry (or last day whichever is appropriate). We consider that this would be a way of improving the timeliness of the fitness to practise process. We can see no reason why a Committee which has had the opportunity to hear live evidence and read the documentation submitted by both sides cannot produce a written decision immediately following the conclusion of the Inquiry.

#### ***Decision making by the Board on receipt of an Inquiry report***

- 6.82 At the time of writing this report, we have not had an opportunity to attend a Board meeting where Fitness to Practise Committee Inquiry report is considered. We have however reviewed the transcripts of five cases which were considered by the Board. We noted that the Board ask limited questions of the parties at the meeting and in the absence of any detailed report containing their decision we questioned the relevance of this process. We address this below in more detail.
- 6.83 The fitness to practise framework allows the Board to remove conditions imposed on a registrant at any time. Where the conditions are related to health, a mandatory review of the conditions by the Board is scheduled after two years. Whilst conditions are monitored by the staff team and formally by the Board we consider that it would be good practice to establish a system of review hearings. This will allow the relevant decision making body to assess

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<sup>20</sup> The written report is drafted by the Committee's legal adviser but the report remains under the ownership of the Committee

any progress, or otherwise, by the registrant and then make a decision on sanction.

- 6.84 In our work in reviewing decisions, we are better able to reach a conclusion that a decision is reasonable where it has been fully explained; in the absence of a detailed explanation we will give consideration to requesting the transcript of the hearing and well understand the limitations this approach brings in assessing witness credibility and the demeanour of the registrant for example.
- 6.85 We consider that the concerns we raise in decision making can be addressed by training and guidance. We note that the documents prepared for training the new Board contains a helpful summary of the purpose of and approach to imposing a sanction as well as there already being in existence a document setting out the approach to the attachment of conditions. We consider that this could be used as the basis for more formal guidance for the Committee and Board. We are also encouraged to note that the need for reasons was set out in the training pack. Given the importance of the function bestowed on the Board by Parliament and in the interests of justice, we consider it important that the Board is seen to be conducting its role effectively and to be engaged. This will avoid the perception that it is merely “rubberstamping” the decision of the Committee.

**All final fitness to practise decisions, apart from matters relating to the health of a professional, are published and communicated to relevant stakeholders**

**We consider it good practice for the entire decision to be published; that includes those allegations where the registrant has not been found guilty of professional misconduct as well. This enhances public confidence in the system of regulation because there is transparency around the process and decision making. We refer above to what a good decision looks like and its importance.**

- 6.86 We have referred above to the notification policy of the NMBI (see paragraph 6.11). The statutory framework provides that findings of the fitness to practise Committee and the decision of the Board shall not be made public without the consent of the registrant unless the registrant has been found guilty of professional misconduct or unfitness to practise by reason of physical or mental disability. In all but the most exceptional circumstances, findings and decisions will also be published in the NMBI newsletter, *Regulation Matters*, and on its website. The decision will remain on the website for a period of three years or, in cases where conditions were imposed, for three years after the conditions have been removed.
- 6.87 The published information includes: each allegation where the nurse has been found guilty of professional misconduct/unfitness because of a physical or mental disability; whether the registrant has been found guilty of professional misconduct and/or unfitness because of physical or mental disability; and the decision of the Board in relation to sanction.

6.88 We note that in circumstances where the registrant has not been found guilty of professional misconduct and/or unfitness the NMBI will always seek consent to inform the complainant of the outcome of the Inquiry. Under the 2011 Act all Inquiries will be held in public

**Information about fitness to practise cases is securely retained**

6.89 The NMBI has put in place a policy in relation to data protection; it also has a designated data protection officer within the staff group. Hard copies of information held by the Fitness to Practise team is stored in a secure storage room. Data protection legislation is due to be significantly amended following the implementation of an EU Directive. A senior staff member has received training on the new requirements and this will be cascaded down to the staff group in due course. The NMBI has reported to us that there has been one data protection breach in relation to fitness to practise information in the last five years. Once the breach had been identified, a review took place which identified the cause of the breach.

## 7. Healthcare Regulation - the future

### Exchange of Information

- 7.1 At section 6.10 onwards of our report we comment on the importance of sharing information about fitness to practise concerns as between regulator and employer/system and other professional regulators. We consider that intelligence about registrants whose fitness to practise is a matter of concern is vital to protecting patients and the system of regulation. Information held by employers or other organisations may place behaviour or conduct in context and would allow the NMBI to take better assess the risk to patients. A two way exchange of information will also mean that the NMBI can alert others where necessary. We consider that the procedural safeguards built into the fitness to practise process will allow only that information which can be substantiated to be used as evidence in a hearing. We note there has been a welcome transition in relation to the ability of the NMBI to keep a complainant updated of the progress of their case. Under the 2011 Act, section 55 provides that the Preliminary Proceedings Committee shall make reasonable efforts to ensure that a complainant is kept informed of all decisions of the Preliminary Proceedings Committee and the Fitness to Practise Committee. We consider further thought should be given to developing legislation which allows for the exchange of information with employers, system and other professional regulators.

### Quorum

- 7.2 We noted at 6.24 that consideration should be given to the quorum needed at a Board Meeting considering whether to make an application to the High Court for an interim order. In order to make the process more efficient we consider that the quorum should be 3. We consider this approach will remove any of the practical difficulties in scheduling a meeting whilst ensuring that the decision is made at a sufficiently senior level. However see our comments below. We do not consider that a smaller quorum will cause any prejudice to the registrant and it will, by making the process more efficient, enhance public protection.

### Duplication of Decision Making

- 7.3 We acknowledge that we are not expert in the principles underpinning Irish law. However, in our view there appears to be what we describe as an additional layer of decision making in the fitness to practise process operated by the ABA and now the NMBI. By this we refer to the role of the Board in recommending a decision made by the Fitness to Practise Committee to impose a sanction; to close a case and whether or not to impose an interim order. We consider that the current framework does not add any additional or meaningful layer of public protection. Such decisions can well be undertaken by an expert and professional Committee.

- 7.4 The benefits of the system we propose are that one decision making body having heard evidence will determine the outcome of the case. By splitting this decision we are concerned that a body which has not heard evidence is not best placed to come to a decision as to sanction, remembering that the focus of sanction is not to punish the registrant but to protect patients and ensure public safety. We note that within the Irish model the registrant is given a further opportunity to make submissions, currently with regard to both professional misconduct and/or unfitness to practise by reason of physical or mental disability and sanction. Given the passage of time that must inevitably exist between the Inquiry, the production of the Inquiry report and the Board meeting where an Inquiry report is considered we have concluded that there exists a risk that a registrant is given time to tailor their submissions to persuade the Board to give administer a more lenient sanction than would otherwise have been handed down.
- 7.5 We have been told that the Board Members can abstain from making a decision on a case; it is not clear to us why, in the absence of any conflict, a Board Member would resile from making a decision. We have also been told that the Board can introduce a level of consistency around the decision making process; we respectfully suggest that this can be achieved by means of comprehensive indicative sanctions guidance and a well-trained fitness to practise committee. An expert committee is well able to assess the evidence before it taking into account the individual circumstances of the case and come to a conclusion which is proportionate and protects the public interest.
- 7.6 If the fitness to practise decision making function was removed from the Board, the registrant's rights would still be protected by a route of appeal to the High Court and also by the fact that the more serious sanctions have to be confirmed by the High Court in any event.
- 7.7 We note that the rationale for this framework is that the decision as to sanction is retained by the regulator as they are best placed to judge standards. We accept that the Irish Constitution may not allow for such a change but we consider that the NMBI may wish to engage in a debate as to effectiveness of the current framework.

### **Separation of functions**

- 7.8 We consider further thought ought to given to separating the operational and strategic functions of the Board. This is outside the remit of our current review and so we do not address the matter in detail in this report.

### **Review Hearings**

- 7.9 As noted at section 6.83 of our report, where conditions are imposed in relation to health there is a mandatory review of conditions by the Board after two years. Consideration should be given to the introduction of review hearings with flexibility around the length of the order and provision for early review.

- 7.10 The purpose of such hearings is to ensure that a nurse or midwife is not permitted to resume unrestricted practice unless the review committee is satisfied that their fitness to practise is not impaired – this can relate to their clinical competency or their previous behaviour. The English Court has endorsed the purpose of review hearings in the *Abrahaem v General Medical Council* [2008] EWHC 183 (Admin) where it stated that *“the statutory context for the Rule relating to reviews must mean that the review has to consider whether all the concerns raised in the original finding of impairment through misconduct have been sufficiently addressed to the Panel’s satisfaction. In practical terms there is a persuasive burden on the practitioner at a review to demonstrate that he or she has fully acknowledged why past professional performance was deficient and through insight, application, education, supervision or other achievement sufficiently addressed the past impairments”*.

## 8. People we spoke to in the course of the review

8.1 The following individuals contributed to the review:

### Staff members

- Dr Maura Pidgeon, Chief Executive
- Ursula Byrne, Acting Director of Regulation
- Veronica O'Rourke, Senior Staff Officer
- Lisa Murphy, Grade III Clerical/Administrative Staff
- David McCann, Acting Grade IV, Clerical/Administrative Staff
- Laura Byrne, Grade III Clerical/Administrative Staff

### Fitness to Practise Committee Members

- Pauline Treanor, Chair
- Ann Sheehan
- Cathriona Malloy
- Catherine Lee

### Stakeholders

- Phelin Quinn, The Chief Inspector of Social Services
- Clare Treacy, Irish Nurses and Midwives Organisation

### Legal Advisers to the Board and Chief Executive

- Eimear Burke, McDowell Purcell Solicitors
- Joanelle O'Cleirigh, Arthur Cox Solicitors
- Eddie Evans, Beauchamps Solicitors

## 9. The standards of good regulation<sup>21</sup>

**Anybody can raise a concern, including the regulator, about the fitness to practise of a registrant.**

- 9.1 The notification of complaints to the regulator should not be a complex process with unnecessary tasks or hurdles for complainants. As with every stage of the fitness to practise process it should be focused on protecting the public and maintaining confidence in the profession and system of regulation.

**Information about fitness to practise concerns is shared by the regulator with employers/local arbitrators, system and other professional regulators within the relevant legal frameworks**

- 9.2 We consider that a joined up approach to regulation and fitness to practise mitigates the risk to public protection which arises when regulators, employers and other local systems work independently of each other and in isolation. This collaborative working involves not only the sharing of information about particular individuals but also analysis of data to inform wider learning and policy development.

**Where necessary, the regulator will determine if there is a case to answer and if so, whether the registrant's fitness to practise is impaired or, where appropriate, direct the person to another relevant organisation**

- 9.3 The purpose of this standard is to assess the quality of the initial decision making process of the regulator. The aim of such processes should be to assure the public that action is taken against those professionals whose fitness to practise is impaired. We expect that regulators have, amongst other things, guidance documents for decision makers, that staff record decisions clearly and the reasons for taking action or for taking no action, that there are tools to assist staff with investigative planning and that the regulator gathers sufficient, proportionate information to judge the public interest in proceeding/not proceeding with the investigation.

**All fitness to practise complaints are reviewed on receipt and serious cases are prioritised and where appropriate referred for consideration under S58 of the 2011 Act/S44 of the 1985 Act**

- 9.4 Robust risk assessment both on receipt of a new case and on receipt of further information is necessary to enable the regulator to assess: what action should be taken; and the priority with which the case should be treated. In some circumstances the regulator may need to take immediate action on receipt of a complaint/further information. Such action could mean applying for an interim order to prevent the registrant from practising unrestricted while the matter is under investigation. We have already noted that the ability of the NMBI to share information with others is restricted by

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<sup>21</sup> As adapted for the legislative framework of professional regulation in Ireland

the legislation; however in circumstances where this is not an issue, we would also expect to see the regulator sending information to other interested bodies, such as an employer

**The fitness to practise process is transparent, fair, proportionate and focused on public protection**

- 9.5 The purpose of this standard to assess how the case management system/processes enables the collection and analysis of reliable data to ensure that there is no bias in the process, with evidence of this testing being carried out by the regulator. This standard also focuses on evidence of the appointment and appraisal process for committee members, panellists and advisors to fitness to practise cases. We consider that it is important that relevant training, guidance and feedback is provided to Committee members, panellists and advisors to fitness to practise cases.

**Fitness to practise cases are dealt with as quickly as possible taking into account the complexity and type of case and the conduct of both sides. Delays do not result in harm or potential harm to patients and service users. Where necessary the regulator protects the public by means of interim orders**

- 9.6 Delays in the progression of cases are not in the interests of complainants, registrants, employers or the public. As we have commented in other work we have done, undue delay in the fitness to practise process can have a negative impact on the reputation of a regulator and public confidence in the system of regulation.

**All parties to a fitness to practise case are supported to participate effectively in the process**

- 9.7 Good customer service is important in maintaining professional and public confidence in a regulator. Effective involvement of all parties in the fitness to practise process increases trust and confidence in the process of regulation as well as facilitating the smooth progression of cases and reducing stress for complainants, witnesses and registrants.

**All parties to a fitness to practise case are kept updated on the progress of their case within the relevant legal framework**

**All fitness to practise decisions made at the initial and final stages of the process are well reasoned, consistent, protect the public and maintain confidence in the profession**

- 9.8 Providing detailed reasons for the decisions that are taken and ensuring that those reasons clearly demonstrate that all the relevant issues have been addressed, is essential to maintaining public confidence in the regulatory process. Requiring decision makers to provide detailed reasons also acts as a check to ensure that the decisions themselves are robust.

**All final fitness to practise decisions, apart from matters relating to the health of a professional, are published and communicated to relevant stakeholders**

- 9.9 We consider it good practice for the entire decision to be published; that includes those allegations where the registrant has not been found guilty of professional misconduct as well. This enhances public confidence in the system of regulation because there is transparency around the process and decision making. We refer above to what a good decision looks like and its importance.

**Information about fitness to practise cases is securely retained**

**Professional Standards Authority for Health and Social Care**

157-197 Buckingham Palace Road  
London SW1W 9SP

Telephone: **020 7389 8030**

Fax: **020 7389 8040**

Email: [info@professionalstandards.org.uk](mailto:info@professionalstandards.org.uk)

Web: [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk)

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