CONTENTS

chapter 1

STATUTORY DEVELOPMENTS

Learning outcomes

At the completion of this chapter the reader should know and understand:

- The structure and divisions of the Nurses Act 1985.
- The key functions to be performed by the Nursing Board in terms of the Nurses Act 1985.
- The changes to be introduced by the Nurses and Midwives Bill 2010.

Nurses Act 1985 and Nurses and Midwives Bill 2010

The Nurses Act commenced on 30 December 1985. If the Nurses and Midwives Bill 2010 is passed and becomes law, Section 4 of that Bill expressly revokes the 1985 Act. Until that happens, the 1985 Act remains the law. This chapter will briefly summarise the structure and content of the 1985 Act and compare it with the corresponding provisions in the 2010 Bill.

Interpretation

Part 1 of the 1985 Act is entitled 'Preliminary and General' and contains the very important interpretation section. It is important to look at this section because certain words in the statute may be given specialised meanings that differ from their everyday use. Failure to read these specialised words as they were intended to be used in the Act is likely to result in an incorrect interpretation of the Act. This is true of any Act.

The interpretation section of the 1985 Act is surprisingly small and simple given the size and impact of the Act and most of the definitions are straightforward and require very little comment. This means that most words in the 1985 Act must be given their ordinary meaning.

A midwife is included in the definition of 'nurse', as the profession of midwifery is currently a part of the nursing profession rather than a separate profession. However, the 2010 Bill seeks to change this.

The interpretation section of the 2010 Bill is also relatively easy to understand. One of the notable definitions it contains is 'poor professional performance', which means a failure by a nurse or midwife to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of a registered nurse or registered midwife, as the case may be, carrying out similar work. This is very similar to the current common law definition of negligence.

In the 2010 Bill there is no longer a definition of nurse, but rather a definition of 'registered nurse' and 'registered midwife', which is a nurse (or midwife) who

is already registered in the Register of Nurses or, after the Bill is passed, who is registered in the register created under the new Act. The definition of midwife will no longer be a part of the definition of nurse, but will have a separate definition.

Part 1 in both the 1985 Act and the 2010 Bill also contains details of the commencement and establishment of the statute and of the other statutes that it repeals (replaces).

An Bord Altranais

Part 2 of the 1985 Act deals with the establishment and regulation of An Bord Altranais (the Nursing Board). The Board is the body that regulates the nursing profession in the Republic of Ireland. It is established by Section 6 of the Act, which summarises its main functions as to:

- Promote high standards of education and training in the nursing profession (for example, drawing up syllabi and exit qualifications, and post-registration training).
- Promote high standards of professional conduct among nurses (this would include questions of discipline and punishment related to the operation of the fitness to practise procedures).
- Fulfil the other functions assigned to it by the Act (the most important being the maintenance of the Register of Nurses and the compliance with European Union Directives relating to nursing and midwifery).

Section 6(2) creates what is known in law as a **juristic person**. It is necessary to distinguish between two classes of legal subject. The first is that of human beings or 'natural persons' and the second is juristic persons. All human beings have the capacity to be the possessors of rights and duties and are therefore legal subjects. Juristic persons are devices created by the law that, although they are not human beings, are still recognised by the law as legal subjects with rights and duties but are not treated exactly the same as flesh and blood persons.

For the purposes of business and public necessity, the law recognises a business entity or community or group of persons as having a legal personality, which in turn means that it can have rights and duties. The fact that this device can have rights and duties means that it can participate in administrative, political, economic and other activities, alongside other persons, in its own name. A company is probably the best-known example of a juristic person; a university is another. Both consist of two or more persons or groups of persons – a company of its shareholders and a university of its council, senate, convocation, principal, lecturers and students; but both are legal entities or persons in their own right and legally separate from the people who make them up.

The Act creates the Nursing Board as a juristic person. This means that the Board will continue to exist even though its members may change (after each election) or where a member dies or retires and is replaced. This is because the Nursing Board is regarded as a person in its own right and does not depend for

its continued existence on the human beings who serve on the Board. This extended 'life' is known as perpetual succession.

The other important consequence of the Nursing Board being a juristic person is that it can buy and sell land and other property in its own name rather than in the name of the people who serve on the Board. If the land or property was in the names of the people who serve on the Board, it would mean that all the documentation relating to the land and property would need to be altered and new names inserted every time the people serving on the Board changed. There is only one name on the documents that record the ownership of the land and other property and that is of the Nursing Board itself as it is a recognised person capable of owning property.

Finally, because it is recognised as a person in the eyes of the law, the Board can sue, and be sued, in its own name. It is not necessary to sue all the individuals who serve on the Board.

A new Board, Bord Altranais agus Cnáimhseachais na hÉireann, or the Nursing and Midwifery Board of Ireland, will be created to replace the existing Nursing Board under Part 2 of the 2010 Bill. Section 6 of the Bill provides that the previous Board will 'continue in being' but its functions will be taken over by the new Board. In other words, the Bill is seeking a seamless transfer of powers and duties from the old Nursing Board to the new Nursing and Midwifery Board.

Section 8 of the Bill provides:

> The object of the Board shall be 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.

This theme of protecting the public as regards the activities of nurses and midwives is a strong and recurrent theme in the Bill.

The new Board will perform similar functions to the old Board. Some of the notable functions are the maintenance of the Register of Nurses as well as introducing measures to streamline the registration procedure; the education of nurses and guidance on professional conduct and ethics; overseeing the creation of a new statutory framework dealing with the ongoing professional competence of nurses and midwives and the setting of standards and criteria for specific occupations within the nursing and midwife profession; the establishment of committees to enquire into complaints, with the emphasis on public hearings; the making of decisions and the giving of direction regarding the imposition of sanctions on nurses and midwives; and advising the public.

Section 9(3) of the Bill instructs the Board, within twelve months of the commencement of the new Act, to 'publish in the prescribed manner a code of practice regarding its interactions with nurses and midwives, candidates and members of the public'.

Membership of the Nursing Board

The Nursing Board consists of twenty-nine members. Seventeen of these members (i.e. a clear majority) are nurses elected by nurses. The Minister for Health appoints the other twelve members, one of whom must also be a nurse, which means that at any one time there are at least eighteen nurses on the Board. The ministerial appointees ensure that the government, the medical profession and the public are also represented on the Board.

The seventeen elected nursing representatives are drawn from the demarcated disciplines of general nursing, paediatric nursing, psychiatric nursing, intellectual disability nursing and midwifery. In turn, these disciplines are represented by representatives from the functional sections of training, general administration and clinical practice. Accordingly, the entire nursing profession is properly represented, ensuring that there is not a dominance of interest in favour of one discipline or one function within the profession.

Section 22 of the 2010 Bill creates a smaller Nursing and Midwifery Board of twenty-three persons. Eleven of the members will be either registered nurses or registered midwives; this group shall consist of two academics, one director of nursing/midwifery and eight registered nurses/midwives. Twelve of the members shall not be nurses or midwives; this group shall consist of one doctor, one academic, two persons nominated by the Health Service Executive (HSE), one person nominated by the Council of Health and Social Care Professionals, one person nominated by the Health Information and Quality Authority (HIQA), one person from the voluntary sector and five other persons appointed by the Minister for Health. In other words, the nurses and midwives on the Board will be outnumbered by people who are not nurses or midwives. The Fitness to Practise Committee will also have a majority of people who are not nurses or midwives.

Committees of the Nursing Board

Section 13 of the 1985 Act authorises the Nursing Board to form committees, which can consist of Board members and other people with relevant expertise who are appointed onto these committees. The exception to this rule is the Fitness to Practise Committee (subsection 2), which must comprise only Board members (subsection 5), at least half of whom must be elected Board members (who are themselves nurses) and at least one-third must be appointed Board members. Finally, the chairperson of the committee cannot be the chairperson or vice-chairperson of the Board.

Under the 2010 Bill, the Fitness to Practise Committee (FPC) must have a majority of non-nurses/midwives. Section 24(10) of the Bill stipulates that at least one-third of the members of the FPC, including the chairperson, shall be members of the Board, whilst 'the majority of the membership of that committee shall consist of persons who are not and never have been registered nurses or registered midwives'. The section goes on to say that at least one-third of the membership of the FPC shall consist of registered nurses or registered midwives.

This could mean that the entire committee could be Board members as long as there is a majority of non-nurses and non-midwives. One would hope, however, that there will be some outside appointments of persons without any connection to the Board. The wording used in the Bill should allow this, thereby avoiding the current situation where the committee is composed entirely of Board members.

The 2010 Bill also provides for the creation of two new committees. The first is the Preliminary Proceedings Committee (PPC), which is to give initial consideration to complaints made against registered nurses and midwives. This is in essence a screening mechanism to decide whether complaints should be pursued further. The workings of this committee, detailed in Part 7 of the Bill, are intended to ensure that proceedings leading up to a charge of being unfit to practise will be carried out in accordance with the rules of natural justice. The PPC must also ensure that complaints are dealt with expeditiously and that the complainant is kept up to date with developments. These measures are presumably a response to the criticism levelled at the Board by the superior courts hearing the applications brought by Ann O'Ceallaigh against the Board and the FPC (see Chapter 2).

The other new committee is the Midwives Committee, which is to advise the Board on all matters pertaining to midwifery. It will consist of at least five members: one must be a registered midwife who is a member of the Board; at least four other persons must be appointed by the Board, and these four persons must consist of two midwives, including one who is a self-employed community midwife; a registered medical practitioner who is a specialist gynaecologist; and a representative of the public who is not a nurse or a midwife.

The Bill seeks to recognise and regulate midwifery as a separate and distinct profession from nursing. This is what it says in the long title. However, there are very few details in the Bill as to how this objective is to be achieved. Section 2(2) of the Bill states: 'For the avoidance of doubt, it is hereby declared and recognised that midwifery is a separate profession to nursing.' Apart from that statement, there is nothing else said about how this separation is going to take place.

There have always been separate divisions in the Register of Nurses, and the new Board is to consist of both nurses and midwives and is to deal with both professions, so what has actually changed? It may well be that the Midwives Committee will be the committee to watch, as it is likely to be the driving force behind the move to separate nursing and midwifery as distinct and independent professions. It is to be hoped that it will formulate policies and practices to ensure this.

The 2010 Bill says that the Board may, but does not have to, establish an Education and Training Committee to oversee the education and training of nurses, midwives and candidates. It may also establish a Health Committee to provide support and assistance to nurses and midwives with disabilities.

Fees charged by the Nursing Board

The Nursing Board generates its own income by charging nurses to register, to continue being registered and to re-register where necessary. The Board also

charges fees for the certificate of registration, registration as a trainee nurse, examinations and training.

Section 38 of the 2010 Bill continues this tradition and authorises the Board to charge fees for essentially the same sort of things as are provided for in the 1985 Act.

Nurses Rules

The Nursing Board is empowered by the 1985 Act to make rules for the purposes of the operation of the Act, for example regarding committees and their membership and functions. The 'Nurses Rules, 2010' begins:

> An Bord Altranais in exercise of the powers conferred on it by Sections 11, 26, 27, 28, 31, 32 and 33 of the Nurses Act, 1985, and by Statutory Instrument, S.I. No. 3 of 2010, Health (An Bord Altranais)(Additional Functions) Order 2010 hereby makes the following Rules.

Section 13 of the 2010 Bill similarly authorises the Board to make rules. This is an extensive section and the new Board will be authorised to make rules regulating, among other things: the running of its committees; the creation and maintenance of the register of nurses and midwives; the candidate register and the advanced nurse practitioner (ANP)/advanced midwife practitioner (AMP) posts register and its divisions; the payment of fees; the receiving and recording by the PPC or the FPC of evidence and/or submissions; the creation and administration of subcommittees of the committees; the setting of criteria for the purposes of education and training; the setting of criteria or conditions for persons who wish to practise nursing or midwifery after having not practised for a period specified in the rules; clinical supervising authorities for midwives; any professional competence scheme; and any other matter relating to the Board's functions.

Generally, the Board must have the approval of the Minister for Health before it can make any rules. The draft form of these rules should be published for comment by interested parties before being finalised and implemented. The Minister will cause any proposed rule to be placed before the Oireachtas, which may annul it if it does not agree with the proposal.

Section 14 of the 2010 Bill authorises the Board to prepare guidelines, consistent with the Act, for the guidance of nurses and midwives and the public.

Registration

One of the Nursing Board's most important functions is the registration of newly qualified nurses and the re-registration of existing nurses. There is also the question of recognising nurses who have trained and qualified in countries other than Ireland. Part 3 of the 1985 Act deals with the question of registration and the maintenance of the Register of Nurses. The register is divided up into

appropriate sections or divisions, determined by specialisation, including a division for midwives.

Section 27 of the 1985 Act instructs the Board to prepare, establish and maintain the register, and thereafter to publish it 'at such times and in such manner as the Minister may direct'. A nurse must notify the Board if there are any changes in his or her name or address. The Board must furnish a nurse with a certificate once his or her registration is complete; the certificate is evidence (including evidence in legal proceedings) that the person named is a registered nurse, until the contrary is shown. The clear intention behind Section 27 is that the Board must maintain a 'live' register, in other words a register that is accurate and up to date, with the names and addresses of all current nurses. The names of persons who have retired, died, failed to pay their retention fee or been declared unfit should be removed.

Section 28 of the Act instructs the Board to register every person who complies with the prescribed conditions for registration, in other words everyone who is a qualified nurse or midwife, including nurses and midwives from other European Union (EU) countries. A nurse with two or more qualifications can be registered in more than one division of the register.

Section 29 instructs the Board to correct the register from time to time, which means that the Board must maintain the register, ensuring its accuracy. Any person who is affected by a correction must be notified and given a chance to correct any further errors.

Section 30 deals with the registration of persons in ancillary professions. This section is essentially defunct as there is now specialist legislation dealing with the registration of professions traditionally seen as ancillary to the nurse's profession, for example social carers and social workers.

According to the 'Nurses Rules, 2010', the register is made up of the following divisions:

- General Nurses Division (RGN).
- Psychiatric Nurses Division (RPN).
- Children's Nurses Division (formerly the Sick Children's Nurse Division) (RCN).
- Intellectual Disability Nurses Division (formerly the Mental Handicap Nurse Division) (RNID).
- Midwives Division (RM).
- Public Health Nurses Division (RPHN).
- Nurse Tutors Division (RNT).
- Nurse Prescribers Division (RNP).
- Advanced Nurse Practitioner Division (RANP).
- Advanced Midwife Practitioner Division (RAMP).

The 2010 Bill continues to recognise the importance of the registration functions carried out by the Board and Part 6 of the Bill is entirely devoted to the

registration of nurses and midwives. This extensive part of the new Bill deals with the creation and maintenance of the current register, and the creation and maintenance of divisions within that register, including the advanced nurse practitioner division and the advanced midwife practitioner division.

Section 50 of the Bill provides for the candidate register, and the wording of that section seems to indicate that this register is separate from the nurses and midwives register, rather than being a division of that register.

Education and training

Part 4 of the 1985 Act deals with one of the most important functions carried out by the Board, namely the education and training of nurses. Sections 31 and 32 allow the Board to make rules for training courses and examinations for candidate nurses and for existing nurses, including rules governing approval of lecturers and teachers, admission to examinations and the granting of certificates to successful candidates. As a rule, the Board does not train and examine directly, but rather appoints other institutions for this purpose.

Section 33 of the Act allows the Board to hold examinations. Again, these are not held by the Board directly, but usually by appointed institutions. These approved institutions are appointed by the Board in terms of Section 34. Section 35 allows the Board to stipulate the minimum educational requirements necessary for entry for training as a nurse. Section 36 instructs the Board to review, at least once every five years, the standards (of both exams and clinical training), the curricula and the suitability of institutions to train candidate nurses. Section 37 instructs the Board to ensure that the training of Irish nurses will satisfy the minimum standards specified in any EU Directive or Regulation.

Part 10 of the 2010 Bill deals with the education and training of midwives. Section 86 sets out the duties of the HSE, as opposed to the Nursing Board, in that regard. Section 86 begins with the following paragraph: 'The Health Service Executive, in accordance with section 7(4)(b) of the Health Act 2004, shall, as far as practicable, facilitate the education and training of candidates.' The remainder of the section details the duties of the HSE 'with respect to specialist nursing and midwifery education and training'. Accordingly, the HSE now has duties to educate and train a specific sector of nurses and midwives, namely specialists in those fields.

Section 87 of the Bill sets out the duties of the Board in regard to the education and training of nurses and midwives. These duties are very similar to those set out in the 1985 Act.

Discipline and sanctions

Part 5 of the 1985 Act deals with the question of fitness to practise and the fitness to practise inquiry, which will be examined in Chapter 2.

The 2010 Bill seeks to create improved procedures to investigate complaints against nurses and midwives. The most significant change in this regard is the formation of the Preliminary Proceedings Committee, the workings of which are governed by Part 7 of the Bill and will be dealt with in the next chapter.

Miscellaneous

Part 6 of the 1985 Act is entitled 'Miscellaneous' and is dedicated to tidying up aspects of the Act that needed attention; it is a sort of 'housekeeping' part at the end. Included in Part 6 are details of what happens to people who pretend to be nurses, which is a serious offence.

Part 13 of the 2010 Bill is the Miscellaneous part and includes sections on the duties of clinical supervising authorities, privilege, investigation, prosecution of offences, the power to specify the form of documents and the amendment of the Freedom of Information Act 1997.

Unlike the 1985 Act, the Bill's offences section is no longer in the Miscellaneous part. Section 39 of Part 6 of the Bill (Registration and Practice) deals with the question of unregistered nurses and midwives being forbidden to practise, whilst Section 40 prohibits any person from attending a woman in childbirth for reward unless he or she is a registered midwife or doctor, or a person training to be either a midwife or doctor and who attends the birth as part of that training. The penalties for being convicted under these sections are harsh. If summarily convicted, the person can receive a fine of up to €5,000 or a prison sentence of up to six months, or both. If convicted on indictment, for a first offence the person faces a fine of up to €65,000 and/or prison for up to five years; and for subsequent offences the convicted person faces a fine of up to €160,000 and/or prison for up to ten years.

Section 44 of the 2010 Bill deals with the offence of impersonating a nurse or midwife or falsely representing to be a nurse or midwife. A person convicted of such an offence is liable for the same harsh punishments as those outlined above with regard to Section 40.

Enactment

The government has said that it intends to have the Bill passed as soon as possible. The Bill completed the Second Stage on 27 May 2010 and was referred to Select Committee on the same day. As of September 2010 there have been no further developments.

Statutory developments: summary

1 The Nurses Act 1985 is made up of six parts:
   (a) Part 1 deals with the commencement of the Act, which was on 30 December 1985.
   (b) Part 2 established An Bord Altranais (the Nursing Board) and dissolved the previous Board.
   (c) Part 3 deals with the registration of nurses and the maintenance of the Register of Nurses.
   (d) Part 4 details how the Board is to control the education, training and examination of nurses, primarily through the appointment of institutions that are qualified to carry out these functions.
   (e) Part 5 deals with the question of whether a nurse is fit to practise and the mechanisms provided to determine that question.
   (f) Part 6 deals with miscellaneous matters, including offences.
2 The Nursing Board, created by the Nurses Act 1985, is a juristic person, with rights and duties, and is capable of owning land and property. It continues to exist in its own name when the human beings who make up the Board die or are replaced in elections. It can also sue or be sued in its own name.
3 The most important functions of the Nursing Board are: registration of nurses and the maintenance of the Register of Nurses; controlling the education and training of nurses; the discipline and, if necessary, punishment of nurses; and ensuring that Ireland complies with its obligations as an EU Member State as regards the recognition of qualifications of nurses who have trained outside Ireland but in the EU.
4 The Nurses and Midwives Bill 2010, if passed, will replace the Nurses Act 1985 in its entirety and will create a new board named Bord Altranais agus Cnáimhseachais na hÉireann, or the Nursing and Midwifery Board of Ireland, which has powers to deal with largely the same areas as those detailed above, but with a greater emphasis on mechanisms to ensure accountability of the nursing and midwifery professions to the Irish public.

Further reading

Nurses and Midwives Bill 2010 and the Explanatory Memorandum, both available from the Department of Health's website.

'Nurses and Midwives Bill 2010', *An Bord Altranais News* (summer 2010), 1–2.

O'Dwyer, P. 'Looking back . . . moving forward: the educational preparation of nurses in Ireland', *Nursing Education Perspectives* 28/3 (2007), 136–9.

Troy, P. H., Wyness, L. A. and McAuliffe, E. 'Nurses' experiences of recruitment and migration from developing countries: a phenomenological approach', *Human Resources for Health* 5 (2007), 15.

Useful websites

An Bord Altranais: www.nursingboard.ie
British and Irish Legal Information Institute: www.bailii.org
Department of Health and Children: www.dohc.ie
Government of Ireland: www.gov.ie
Irish Medical Directory: www.imd.ie
Irish Statute Book: www.irishstatutebook.ie

chapter 2

THE FITNESS TO PRACTISE INQUIRY

Learning outcomes

At the completion of this chapter the reader should know and understand:

- The principles of natural justice and the concept of *ultra vires*.
- The procedure to be followed by the fitness to practise inquiry in terms of Section 38 of the Nurses Act 1985.
- The options available to the Nursing Board in terms of Section 44 of the Nurses Act 1985.
- The sanctions that may be imposed on a nurse who is found guilty of misconduct by the inquiry.
- The role of the High Court.
- The changes to be introduced by the Nurses and Midwives Bill 2010.

Introduction

Part 5 of the Nurses Act 1985 is entitled 'Fitness to Practise' and details the disciplinary powers of the Nursing Board and, more specifically, the workings of the Fitness to Practise Committee (FPC).

A nurse can be removed from the Register of Nurses for misconduct or incapacity. It is impossible to define misconduct precisely in the nursing sense, but a starting point may be found in the 'Nurses Rules, 2010' and other professional or ethical guidelines.

Ultra Vires and the Principles of Natural Justice

An internal disciplinary body is governed by administrative law. The most important concepts that need to be remembered when looking at administrative law are the principles of natural justice. Another concept that is important to know about is *ultra vires*.

The principles of natural justice are rules entrenched in the common law. The first important principle of natural justice is *audi alteram partem* (hear the other side), which, in the context of disciplinary hearings, means that anyone whose rights, privileges and liberties are affected by the action of an administrative authority must be given a chance to be heard on the matter. In practice, this means that everyone is entitled to speak in their own defence. When a complaint made against a nurse is placed before the FPC, the nurse has the right to bring forward evidence and witnesses in his or her defence and to inspect and question the evidence and witnesses brought against him or her.

The second important principle of natural justice that is applicable to disciplinary hearings is *nemo judex in sua causa* (no one may be a judge in his own

cause). This means that the person or people who sit on the FPC must be independent of both sides and have no interest in the outcome of the hearing. In other words, the committee members must be completely fair and impartial to the nurse who has been accused of misconduct and any members who are unable to be impartial (they may know the nurse well or may have had a previous unpleasant experience with that nurse) must excuse themselves and take no part in the hearing.

Finally, a body created by a statute is only allowed to exercise powers that have been given to it by that statute. As the FPC is created by statute (Nurses Act 1985) it is not allowed to exercise powers that it has not been given by that Act. If it does something that is not provided for by the empowering statute, it will have acted *ultra vires* (outside the law). The nurse on the receiving end of that unlawful exercise of powers could challenge the decision of the FPC before the High Court, through a process known as judicial review. If the nurse is successful, the High Court can reverse the committee's decision.

With these principles in mind, it is necessary to examine the applicable provisions of Part 4 of the Nurses Act 1985.

Procedure in a Fitness to Practise Inquiry

Section 38 of the Nurses Act 1985 is a vitally important section as it lays down the entire procedure to be followed when a complaint is made concerning a nurse's conduct or capacity and raising questions about that nurse's fitness to practise. A complaint against a nurse can be made by 'any person': most often this will be a member of the public (including visitors and relatives of patients), but it could also be a fellow nurse, any other health professional, a patient or perhaps even a lawyer acting on behalf of an unhappy patient.

In addition to complaints of misconduct, Section 38 applies to allegations that a nurse is incapacitated from fulfilling his or her functions and duties by reason of a physical or mental disability. The Nurses and Midwives Bill 2010 says that the Board may create a committee, known as the Health Committee, to support and assist nurses and midwives with disabilities. It will be interesting to see whether this committee is used as an alternative mechanism to the fitness to practise procedure when a nurse or midwife is incapacitated through disability as opposed to misconduct. At the very least it should be a precursor to the FPC, in an attempt to resolve the matter without resorting to adversarial proceedings.

What happens once a complaint is received is essentially a two-step procedure. The FPC must first consider the merits of the complaint and whether the nurse in question has a case to answer – what is known as a *prima facie* case (a case on the face of it). If the FPC feels that there is no substance to a complaint, or that the action of the nurse was so minor that any disciplinary action would be excessive, the matter should end there and then. However, the FPC does not take this decision alone. Instead it must report to the Nursing Board with its recommendation. After considering the recommendation, the Board can either agree that the matter be closed, or disagree and insist that an inquiry be held. It

is highly unlikely that the Board would ever refuse to follow the FPC's recommendation, particularly as the FPC consists of Board members.

Section 38 does not instruct the FPC or the Board to notify the nurse about the complaint or to invite the nurse to make representations. It describes this first stage of the process as an internal matter dealt with by the FPC. The nurse who is the subject of the complaint has very little to do with the process at this stage and often is not notified of the complaint until the FPC has decided whether to pursue or discard the complaint.

The Supreme Court criticised this approach in its decision in *O'Ceallaigh v An Bord Altranais* (Unreported, SC, 17 May 2000). It found that there was no express provision in Section 38 for either the Board or the FPC to notify the nurse who is the subject of the complaint before making a decision on whether to establish an inquiry in terms of Section 38. However, despite the wording of Section 38(2), the Supreme Court held that there was a duty to notify the nurse at that stage so that the nurse could respond to the complaint before the decision was taken on whether to establish an inquiry. This is in keeping with the *audi alteram partem* principle, as the decision made by the FPC at that first stage clearly impacts on the nurse concerned and therefore that nurse should be able to have input on the matter under consideration.

In other words, even though Section 38 does not tell the Board to notify the nurse about the complaint and invite representations from the nurse in response to the complaint it does not mean that there is no duty on the Board to do just that. The principles of natural justice are older and more established than the Nursing Act and the Board should not forget these fundamental principles when it interprets the Act. The Supreme Court said that neither the FPC nor the Board could be said to be exercising its power lawfully and fairly without the nurse being informed of the complaint and the FPC and/or the Board having sight of any response to the complaint that the nurse might make before the FPC and/or the Board decided whether to proceed with the inquiry.

This decision is important as it means that a nurse would have an opportunity to stop the matter going any further if he or she could produce evidence at the preliminary stage to show that the complaint had absolutely no merit, rather than having to go through the entire procedure of the inquiry, including the wait before the inquiry. This approach would also force the FPC and the Board to proceed quickly with the formalities if they want to take any action against a nurse. When one considers that Ann O'Ceallaigh, a domiciliary midwife who specialised in homebirths, was suspended for over two years as a result of a complaint, it is easy to see how prejudicial that first stage decision could be to a nurse. It is only proper that the nurse should be able to respond to the complaint as soon as possible.

The Nurses and Midwives Bill 2010 has taken this criticism into account by creating the Preliminary Proceedings Committee (PPC) in Part 7 of the Bill. Section 57 says that the initial complaint against the nurse or midwife will be made to the PPC. Under Section 58, the Board can appoint people to assist the

PPC and these people can interview witnesses, take statements, receive documentary evidence and advise the PPC. Section 59 says that the PPC shall 'consider whether there is sufficient cause to warrant further action being taken in relation to the complaint'.

Importantly, under Section 59(6) to (9) of the Bill, the PPC must notify the nurse or midwife who is the subject of the complaint and supply to that nurse details of the nature of the complaint and the name of the complainant. In response to this, the nurse or midwife may supply to the PPC 'any information that the nurse or midwife believes should be considered by the Committee or the Fitness to Practise Committee'. The PPC may even require the nurse or midwife to supply this information. This will probably become the standard procedure (i.e. the PPC will inform the nurse or midwife about the complaint and the complainant and instruct the nurse or midwife to respond by placing any information before the PPC that he or she wants it to consider). If the nurse or midwife fails or refuses to supply this information, the PPC has at least complied with the principles of natural justice as emphasised by the Supreme Court.

The second step of the procedure under Section 38 of the 1985 Act commences once the FPC and the Board (or the Board alone) decide to proceed with the complaint and hold an inquiry. This operates along the lines of a disciplinary inquiry with the evidence being presented against the nurse or midwife who is the subject of the complaint, and the nurse or midwife being allowed to challenge that evidence and lead evidence of his or her own. The FPC is given the powers possessed by a High Court judge as far as getting witnesses to testify or produce documents. Obviously, the witnesses themselves have the same immunities and privileges as witnesses before the High Court (i.e. they can claim testimonial privilege or privilege against self-incrimination).

In another application brought by Ann O'Ceallaigh – *O'Ceallaigh v Fitness to Practise Committee of An Bord Altranais* (Unreported, SC, 11 December 1998), the Supreme Court held that the nurse or midwife against whom the complaint is brought is entitled to produce expert witnesses to testify in his or her defence and that these witnesses are entitled to be present at the inquiry held in terms of Section 38 of the 1985 Act.

In terms of the 2010 Bill, the FPC comes into the picture only once the PPC and/or the Board has decided that there is a *prima facie* case for the nurse or midwife to answer and refers it to the FPC under Section 63 of the Bill.

Part 8 of the 2010 Bill deals with the conduct and proceedings of the FPC. Section 64 says that once the complaint is referred to the FPC, the chief executive officer of the Board must notify, in writing, the nurse or midwife who is the subject of the complaint. The notice must set out the nature of the complaint, including the particulars of any evidence in support of the complaint; and inform the nurse or midwife of the right to be present, to be represented and to offer a defence against the complaint. The nurse or midwife may request that all or part of the hearing be held in private rather than in public and must give the reasons for that request (what is known as showing reasonable and sufficient cause). It is

interesting to note that the witnesses, including the complainant, can also request that some or all of the hearing be heard in private and again they must show reasonable and sufficient cause. The notice must also contain details of the date, time and place of the hearing in sufficient time for the nurse or midwife to prepare for the hearing.

Section 65 of the Bill details how the hearing is to be run. The hearing must be a public hearing unless the FPC decides that there is sufficient cause to hold some or all of the hearing in private. The chief executive officer must present the evidence supporting the complaint, witnesses will testify under oath (or presumably affirmation, which is a secular oath), and there is a right to cross-examine these witnesses and call evidence in reply. As in the 1985 Act, Section 66 of the Bill says that the FPC has all the powers, rights and privileges that are possessed by a High Court judge, including the right to subpoena witnesses, to examine witnesses (and hear evidence orally or by affidavit, CCTV, video recording, sound recording or other format) and to order the production of documents. Similarly, witnesses are entitled to claim the usual privileges and immunities.

Ann O'Ceallaigh raised another important issue concerning the FPC and involving the second principle of natural justice, namely that of *nemo judex in sua causa* (no one may be a judge in his own cause), which in practice means that the person in charge of the inquiry must be seen to be completely neutral and independent without any interest in the outcome of the proceedings. In an application to the High Court – *O'Ceallaigh v An Bord Altranais and Others* (Unreported, HC, 23 October 2009), O'Ceallaigh asked the court to set aside a decision of the FPC on the grounds that the chairperson of the committee hearing the complaint against her could not be objective because one of the witnesses who was giving evidence against her worked in the same hospital (Rotunda) as the chairperson. O'Ceallaigh argued that this created an apprehension of bias as a result of the professional relationship between the chairperson and the witness.

The High Court found that there was no apprehension of bias. The court said that a reasonable person, on the facts before it, would not worry that O'Ceallaigh would not receive a fair and impartial hearing because of the risk of bias on the part of the chairperson. The relationship between the chairperson and the witness was not enough in itself to prove bias. It had to be shown that the circumstances of that relationship and its connection with the proceedings were such that it had the capacity to influence the mind of the decision maker. The relationship must be such that there is 'a community of interest' between them that is directly related to the subject matter of the proceedings for objective bias to arise. This link must be cogent and rational. The fact that the relationship was between the chairperson and a witness, rather than one of the parties before the hearing, meant that the test to establish bias was higher.

This test set out by the High Court to establish an apprehension of bias is extremely strict as it seems to require that the applicant must establish bias rather than an apprehension of bias. We all know the maxim that justice must not only

be done, it must be seen to be done. If a reasonable person heard about the relationship between the witness and the chairperson would they think 'that doesn't sound right'? It could be argued that on the facts there is a reasonable apprehension of bias. For example, if the relationship meant that the chairperson automatically believed everything that the witness said, without objectively analysing the testimony of the witness, is that not enough for the chairperson to recuse himself or herself? The question is not whether the chairperson would automatically believe everything that the witness would say, but whether a reasonable person might foresee that there is a danger that that will happen. There is no indication in the judgment as to whether O'Ceallaigh has appealed the decision of the High Court, but perhaps she should.

Sanctions

Erasure or suspension from the register

If the Nursing Board finds that a person is unfit to practise, either because of misconduct or incapacity, it can do one of two things under Section 39 of the 1985 Act. The Board can either remove the nurse from the Register of Nurses altogether (this is called 'erasure' in the section) or suspend the nurse from practising as a nurse for a certain period. The Board has other options when it comes to sanctioning nurses, but these are provided in later sections.

The Board must inform the nurse of its decision in writing and deliver this to the nurse. The nurse has twenty-one days from the date of the decision to challenge it before the High Court, as a matter of judicial review. It is important to note that this time limit starts to run from the date of the decision and not from the date that the news of the decision was received by the nurse.

A nurse proceeds with an application for an appeal by using a special summons and an affidavit (sworn evidence in a document) setting out the nurse's reasons for challenging the Board's decision. The Board will reply to these written representations in its own affidavit. Where there are extraordinary circumstances, for example where a witness was not available at the hearing or there is a dispute about whether a witness told the truth, the High Court can order a full re-hearing of the matter. At this re-hearing the witnesses will again give their evidence, but this time it will be in court. This is what happened in *K v An Bord Altranais* [1990] IR 396.

If a nurse does not apply to the High Court and does not give any indication that he or she intends to challenge the decision of the Board, the Board is entitled to apply to the High Court to confirm its decision. In making such an application, the Board must show that the nurse had an opportunity to be heard, that the finding of the Board was correct and equitable and that the Board is seeking to enforce what is an appropriate punishment.

On reviewing the decision of the FPC and/or the Board, the High Court can do one of three things: agree with the decision and confirm it, disagree with the decision and cancel it or change the decision for one it decides is more appropriate.

The nurse may be given leave to appeal the decision of the High Court to the Supreme Court, but only on a point of law. In other words, if the nurse was arguing that the High Court's interpretation of the Act or the common law was wrong, this could be the basis of an appeal. The nurse cannot appeal the decision just because he or she does not agree with that decision.

Retention on register with conditions

If the Board decides that a removal or suspension from the Register of Nurses is not appropriate on the facts of a proven complaint, Section 40 of the 1985 Act authorises the Board to allow the nurse to continue to practise but with conditions or restrictions on the nurse's freedom to practise. For example, a nurse might be prohibited from doing certain tasks or practising outside a certain area.

If the nurse is unhappy with this decision, the same procedures apply as those described above in relation to Section 39, namely to bring the matter before the High Court on review.

Other sanctions

If the Board decides that removal, suspension or restriction would not be appropriate on the proved facts of the complaint, Section 41 of the 1985 Act allows it to advise, admonish or censure a nurse, which essentially amounts to an official (and therefore recorded) scolding. Interestingly enough, the section does not provide that the nurse can challenge the censure in the High Court. However, if the nurse can show that the censure will have a serious and damaging impact on his or her career, it must be argued that the failure of the legislature to provide for a remedy in the High Court cannot be said to disqualify the nurse from challenging the censure in the High Court.

Section 42 of the 1985 Act says that a nurse can be removed from the register if convicted in the Republic of Ireland of an indictable offence (a criminal offence that is serious enough to warrant a jury trial). If the nurse is convicted in another country of an offence that would be an indictable offence in the Republic of Ireland, then that shall have the same effect and the nurse can be removed from the register. The nurse can challenge such decisions in the High Court, and the same procedures apply as in Sections 39 and 40.

Part 9 of the Nurses and Midwives Bill 2010 details the sanctions that are available to the Board if a complaint is upheld against a nurse or midwife by the FPC and confirmed by the Board. Section 71 says that the Board can decide that one or more of the following sanctions be imposed on the nurse or midwife:

(a) an advice or admonishment, or a censure, in writing;
(b) a censure in writing and a fine not exceeding €2,000;
(c) the attachment of conditions to the nurse's or midwife's registration, including restrictions on the practice of nursing or midwifery that may be engaged in by the nurse or midwife;

(d) the transfer of the nurse's or midwife's registration to another division;
(e) the suspension of the nurse's or midwife's registration for a specified period;
(f) the cancellation of the nurse's or midwife's registration from the register of nurses and midwives or a division of that register;
(g) a prohibition from applying for a specified period for the restoration of the nurse's or midwife's registration in the register of nurses and midwives or a division.

Under Section 73 of the Bill, the Board must notify the nurse or midwife in writing of its decision regarding the sanction, the date on which the decision was made and the reasons for arriving at that decision.

Section 74 says that a decision under Section 71 to impose a sanction (unless it was an advice, admonishment or censure) shall not take effect unless the decision is confirmed by the High Court on an appeal under Section 75 or an application by the Board to confirm under Section 76. This is an important provision as it means that there will always be court involvement when a decision to punish is made by the FPC and the Board acts on that recommendation.

Under Section 75, the nurse or midwife who has been notified of that sanction can appeal to the High Court against the sanction within twenty-one days of receiving the notification. This is the judicial review procedure discussed earlier. Again, the court can confirm, quash or substitute. Section 76 says that even if the nurse or midwife does not appeal the sanction, the Board may apply to the court for confirmation of the decision. This application can be made *ex parte*; in other words, the Board does not have to tell the nurse or midwife concerned that it is going to court to ask for a confirmation in terms of this section. Section 77 authorises the court to hear expert witnesses in a hearing under Sections 75 or 76.

Again, the nurse or midwife can appeal against the decision of the High Court to the Supreme Court, but only on a question of law.

Section 79 authorises the Board to remove a nurse or midwife from the Register of Nurses and Midwives for failing to pay the registration renewal fee, unless that nurse or midwife is the subject of a hearing pursuant to a complaint against him or her. Section 80 says that this removal can be reversed if application is made, and the outstanding fee paid, not later than six months after the fee was due.

If the Board refuses to renew a registration, or attaches conditions to the registration, it must notify the nurse or midwife concerned of the reasons for that refusal or conditions, so as to allow that nurse or midwife to appeal the decision in court within twenty-one days of receiving the notice. Again, the procedure is that of judicial review and the court can confirm, quash or substitute the decision of the Board.

Removal from register for non-payment of fees

Section 47 of the 1985 Act authorises the Board to reinstate a nurse on the Register of Nurses where that nurse's name was deleted from the register as a result of non-payment of fees. The section is clear that this is the only reason the Board can use to reinstate a nurse on the register. In other words, this section does not cover the situation where a nurse was removed for misconduct or incapacity, it applies only where the nurse was removed for not paying the annual fee.

This matter is dealt with by Sections 79 to 81 of the 2010 Bill, which say that nurses or midwives who fail to pay a fee, despite a notice calling on them to do so, may be removed from the register. Restoration of such a registration will be performed by the Board's chief executive officer if the fee is paid within six months of its due date and is accompanied by an application for restoration. Section 83 allows a nurse or midwife to appeal to the High Court against any decision by the Board to remove his or her name from the register for failing to pay a fee.

Immediate Suspension Pending the Fitness to Practise Inquiry

Section 44 of the 1985 Act authorises the Nursing Board to apply to the High Court, before or even during the inquiry, to remove a nurse's name from the Register of Nurses. This is clearly a serious step as it prevents the nurse from practising and therefore earning a living as a nurse. The Board must show the High Court that it would be in the interests of the public to have the nurse's name removed from the register in order to stop that nurse practising.

The Board can approach the High Court on an urgent *ex parte* application, which is an application in the absence of the nurse against whom the complaint was made. This means that the Board can approach the High Court without giving any notice to the nurse that it intends applying to the High Court for his or her removal from the register. This application can be heard *in camera*, which means that no members of the general public are allowed to be present when the application is argued before the judge. The High Court has a very wide discretion in deciding what would be the appropriate thing to do on the facts presented to it.

These are called injunction proceedings as they stop the nurse from practising. They are granted in urgent and serious circumstances where a disciplinary hearing could not act soon enough to prevent harm to the public. In other words, as a person is always presumed innocent until proven guilty, there would need to be clear evidence that the nurse presents a danger to the public and must be stopped immediately.

An injunction hearing is usually a two-stage procedure. As the court might hear only the applicant's version before it grants the injunction, this first injunction is called an interim injunction and is really seen as a temporary or stop-gap measure until the court can hear full arguments from both sides on the 'return day' (the date of the continuation of the hearing). If the court does not stipulate a return day, either the Board or the nurse can apply for one, which should ensure that the matter will be resolved quickly.

Ann O'Ceallaigh, the midwife referred to earlier, was also injuncted (prevented by an injunction) from practising as a midwife, as the Board made a successful application to the High Court for an injunction against her even before the Section 38 hearing started. This so-called interim injunction prevented O'Ceallaigh from practising for two years. When the Board approached the High Court two years later and asked the court to make the injunction a permanent injunction, this application was refused. The court said that the Board should have familiarised itself with the current facts of the case before making the application for a permanent order because a lot of things had changed over the two-year period.

The Board appealed this decision to the Supreme Court, arguing that it was not obliged to reassess the facts before it applied for a permanent injunction as long as it could show that it was in the public interest to prevent the nurse from practising at the time of the first application. The Supreme Court agreed with this argument, but pointed out that a court might not grant the permanent injunction if it was clear that things had changed considerably since granting the interim injunction. Accordingly, the Board must keep up to date with developments so that it can properly decide whether it is worthwhile asking for the injunction to be made final. On the facts, the Supreme Court agreed with the High Court that the injunction should not be renewed or finalised because the circumstances had changed considerably over the intervening two years.

The Supreme Court criticised the Board for dragging the matter on for two years. It pointed out that the Section 44 proceedings were designed to provide speedy relief to the Board whilst the complaints against the nurse were investigated; they were not meant to be used to punish the nurse for two years. The Supreme Court did not go so far as to say that Section 44 imposed a duty on the Board to determine how the situation had changed between the time of the interim injunction and the time of the full hearing, but it made it clear that the court would be reluctant to act on old information. In practice, this should force the Board to complete the disciplinary hearing as soon as possible and to keep up to date with developments between the dates of the first and second hearings.

Section 60 of the Nurses and Midwives Bill 2010 is similar to Section 44 of the 1985 Act. It allows the Board to make an *ex parte* application to suspend a nurse or midwife 'if the Board considers that the suspension is necessary to protect the public until steps or further steps are taken under this Part and, if applicable, Parts 8 and 9'. The application hearing must be in public unless the court decides otherwise. The court can make any appropriate order, including the suspension of the nurse or midwife for a specified period, and it can give the Board any appropriate directions. Given the nature of the Supreme Court's comments about Section 44 of the 1985 Act, which will equally apply to this new section, one must anticipate that if the court does order suspension, it will order a limited period of suspension that will in effect force the Board to gather and present its evidence against the nurse or midwife as soon as it can.

Fitness to practise hearing: summary

1 A nurse can be removed or suspended from the Register of Nurses for misconduct or incapacity.
2 If the Nursing Board decides that removal (erasure) or suspension is too harsh a punishment in the circumstances, the nurse can be restricted or censured.
3 These punishments can be imposed on a nurse only after an inquiry finds him or her guilty of misconduct or incapacitated by reason of physical or mental disability.
4 Section 38 of the Nurses Act 1985 sets out the procedure for the fitness to practise inquiry. Section 44 sets out the procedure where the Board can injunct (legally prevent) a nurse from practising as a nurse before and during the inquiry.
5 This inquiry must obey the principles of natural justice and the nurse must be given a proper opportunity to defend himself or herself against any complaints. The nurse is entitled to expect that the inquiry will be carried out by neutral and impartial people.
6 Section 38 provides for a two-step procedure. First, the Fitness to Practise Committee (FPC) decides whether there is any substance to the complaints made against the nurse. If the FPC and the Board decide that the complaints are serious enough to justify an inquiry, the inquiry will be set up. The nurse must be given a chance to respond to the complaints at the beginning of the first stage, before a decision is made on whether to proceed with the inquiry. In the Nurses and Midwives Bill 2010, each step of this two-step procedure is carried out by a separate committee, namely the Preliminary Proceedings Committee and thereafter the FPC.
7 A nurse is entitled to appeal the decision of the FPC and/or the Board to the High Court.
8 The High Court can disagree with the finding of the FPC and/or the Board and reverse the decision, or it can agree with and confirm the decision, or it can substitute its own decision.
9 It is possible to appeal the decision of the High Court to the Supreme Court, but only on very narrow grounds.
10 The Nurses and Midwives Bill 2010 increases the range of sanctions and measures available to the Board against a nurse or midwife who is found guilty of misconduct. The Bill also provides that all hearings will be held in public, unless the inquiry decides otherwise.

Further reading

'Cases and comment: *O'Ceallaigh* (applicant/appellant) *v Fitness to Practise Committee of An Bord Altranais* (respondents)', *Medico-Legal Journal of Ireland* 7/2 (2001), 90a.

Duffy, G. 'Fitness to practise, preliminary inquiries and fair procedures – a change in standards?', *Irish Law Times* 18 (2000), 298.

Flanagan, J. 'Cases and comment: *Ann O'Ceallaigh* (applicant) *v The Fitness to Practise Committee of An Bord Altranais and An Bord Altranais*', *Medico-Legal Journal of Ireland* 4/2 (1998), 87a.

Nicholas, J. 'Cases and comment: *Ann O'Ceallaigh v An Bord Altranais and Others*', *Medico-Legal Journal of Ireland* 16/1 (2010), 47a.

Useful websites

Ann Kelly support page: http://ireland.iol.ie/~raydj/Ann/entry.htm

'Who Is Ann Kelly?': www.iol.ie/~raydj/Ann/who.htm