

Legislative Background:

Mediation is a form of alternative dispute resolution whereby the parties attempt to resolve their complaint with the assistance of an independent third party. The objective of the mediation process is to reach an outcome that is acceptable to both the complainant and the registrant.

Section 60(1) of the Nurses and Midwives Act 2011 ('the Act') states that "The Board may provide guidelines for resolving complaints by mediation or other informal means". Subsection (3) provides that "No attempt may be made to resolve a complaint by mediation or other informal means without the consent of the complainant and the registered nurse or midwife the subject of the complaint". Subsection (6) provides that "The resolution of a complaint pursuant to guidelines prepared under subsection (1) shall not include the payment by any party of financial compensation".

Section 59 (1) provides that where the PPC is of the opinion that (c) the complaint is one that could be resolved by mediation or other informal means pursuant to guidelines prepared under section 60 (1) it shall inform the Board of that opinion.

The PPC will form such an opinion in circumstances where it believes that mediation may be of assistance to both the complainant and the registrant as a means of restoring the nurse/patient or midwife/patient relationship. Both parties must consent to mediation.

The Board would not refer a complaint for resolution under section 60 where from a regulatory perspective it was of the view that it was necessary in the public interest that a FTP inquiry take place.

There is no provision in the Act for a complaint to be reactivated by the PPC. There is no reference to reporting back to the Board (from where the referral to the mediation will ultimately have come) and no statutory provision for the Board to refer a matter back to the PPC if mediation fails or to direct the PPC to refer a matter to the FTPC after a failed mediation.

Comparative analysis

Complaints against pharmacists:

The legislation relating to mediation set out in the Pharmacy Act 2007 is completely different to what is set out in the Nurses and Midwives Act 2011. It is explicit under Section 40 (1) of the Pharmacy Act 2007 that a complaint may either be referred to mediation or to a committee of inquiry where it has reached the threshold of warranting further action. The Pharmacy Act also allows for a disciplinary process to be reactivated and also permits the

reporting and imposition of sanctions following mediation. The Pharmaceutical Society of Ireland has only used mediation on two occasions in circumstances where the Registrar was the complainant (as is provided for in legislation) and the executive took part in the mediation process.

Complaints against medical practitioners:

The Medical Practitioners Act has identical mediation provisions to the Nurses and Midwives Act 2011. The Medical Council have only used mediation rarely and only where there is a realistic prospect of restoring the doctor/patient relationship.

How mediation would work in practice

It is a matter for both parties to decide whether any other person such as a legal representative or an expert witness may participate in the process.

A panel of qualified and accredited mediators will be established by NMBI using a tendering process. The accrediting bodies will be either the Chartered Institute of Arbitrators or The Mediators Institute of Ireland. A list of mediators will be made available by the Fitness to Practise Department to the parties once written consent to mediate has been received by NMBI. It will be a matter for the parties to agree upon a mediator. The Medical Council provide both parties to the mediation with a list of three potential mediators together with a profile of the mediators. If both parties to the mediation pick the same mediator that mediator is used. However if both parties pick a different mediator the mediator that neither party picked is used.

Once a mediator is selected from the panel, the Fitness to Practise Department in the NMBI will make contact with the mediator and arrange a suitable date, time and place for the mediation to take place. The Fitness to Practise Department will then communicate the arrangements to both parties.

The mediation process can last a maximum of one day. The NMBI will pay the professional fee of the mediator and will also provide the facilities. Unless the Board is the complainant in a case, NMBI staff will not be involved. If the Board is the complainant, a member of the Fitness to Practise Department will attend.

NMBI will not be responsible for legal costs incurred, if any, by either party arising from the mediation process or for any other expenses incurred by either party such as travel expense incurred in attending the mediation or securing the opinion and attendance of an expert witness.

It will be a matter for the parties to the mediation to agree on the terms of the agreement, if an agreement is to be reached.

The mediator should inform NMBI whether or not the parties to the mediation reached an

agreement but no other details of the mediation will be furnished to the NMBI as these are confidential.

Should a party breach the terms of any agreement reached there is no recourse to the disciplinary processes of NMBI and the matter cannot be referred back either to the PPC or to the Fitness to Practise Committee for Inquiry.

Costs:

Costs will be incurred on a daily basis for the regulator and further costs will be incurred for the hiring of suitable premises for the day if it is not possible to hold the mediation at the offices of NMBI.

Appendix

Wording of legislation relating to 'Mediation' in Nurses and Midwives Act 2011.

59.— (1) Where the Preliminary Proceedings Committee is, in respect of a complaint, of the opinion that—

(a) there is not sufficient cause to warrant further action being taken in relation to the complaint,

(b) the complaint should be referred to another body or authority or to a professional competence scheme, or

(c) the complaint is one that could be resolved by mediation or other informal means pursuant to guidelines prepared under section 60 (1),

it shall inform the Board of that opinion.

(2) The Board may, after considering an opinion referred to in subsection (1) in respect of a complaint, do one or more than one of the following:

(a) decide that no further action is to be taken in relation to the complaint;

(b) direct the Preliminary Proceedings Committee to refer the complainant to another body or authority;

(c) refer information in relation to the complaint in accordance with a co-operation agreement entered into under section 15 ;

(d) refer the complaint to a professional competence scheme;

(e) refer the complaint for resolution by mediation or other informal means; or

(f) if it considers it necessary to do so, direct that further action be taken under section 61 .

(3) Where the Board, in respect of a complaint, makes a decision referred to in subsection (2)(a) or a referral referred to in subsection (2)(b) or (d), the Board shall give notice in writing of the decision or referral, as the case may be, to—

(a) the registered nurse or registered midwife the subject of the complaint, and

(b) the complainant in any case where the Board is not the complainant.

Resolution of complaints by mediation or other informal means.

60.— (1) Subject to subsections (3) and (6) and without prejudice to the generality of section 14, the Board may prepare guidelines for resolving complaints by mediation or other informal means.

(2) Without prejudice to the generality of subsection (1), guidelines prepared under that subsection may include provision for one or more than one of the following:

(a) a determination to be made about whether a complaint can be resolved by mediation or other informal means or whether it warrants the holding of an inquiry;

(b) the persons who may attempt to mediate or otherwise resolve the complaint;

(c) the recording of the manner in which the complaint was resolved and of the agreement of the complainant and the registered nurse or registered midwife the subject of the complaint to the resolution;

(d) the steps to be taken (including notice to the complainant, the registered nurse or registered midwife the subject of the complaint and the Preliminary Proceedings Committee) if the complaint cannot, in the opinion of the person attempting to do so, be resolved by mediation or other informal means;

(e) any other matters that the Board considers necessary or appropriate for facilitating the resolution of the complaint by mediation or other informal means.

(3) No attempt may be made to resolve a complaint by mediation or other informal means without the consent of the complainant and the registered nurse or registered midwife the subject of the complaint.

(4) A consent given by a registered nurse or registered midwife the subject of a complaint for the purpose of this section shall not be taken as an admission of any allegation.

(5) No answer or statement made, in the course of attempting to resolve a complaint pursuant to the guidelines prepared under subsection (1), by the complainant or the registered nurse or registered midwife the subject of the complaint may—

(a) be communicated to any person other than the persons participating in the attempt to resolve the complaint, or

(b) be used in any disciplinary, civil or criminal proceedings.

(6) The resolution of a complaint pursuant to guidelines prepared under subsection (1) shall not include the payment by any party of any financial compensation.

(7) The Board shall ensure that guidelines prepared by it under subsection (1) are published in the prescribed manner.