

Fitness to
Practise

The Role of the Expert Witness

(Second Edition)

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Bord Altranais agus
Cnámhseachais na hÉireann
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Glossary

Please note that in some instances the descriptions for the terms used are based on NMBI's fitness to practise process. In other instances, definitions have been drawn from the Citizens' Information website (www.citizensinformation.ie). None of the terms are necessarily legal definitions.

Term	Definition or description
Allegation, sub-allegation	A statement or claim about the action taken or omission made
Assumption(s)	Things accepted as truth
Chief Executive Officer (CEO)	CEO of the Nursing and Midwifery Board of Ireland (NMBI)
Complainant	The person who made the complaint
Complaint	A complaint is a statement that something is unsatisfactory or unacceptable. Refer to NMBI Complaints against Nurses and Midwives on our website
Conflict of interest	A situation in which your personal interests, obligations or loyalties could influence or be seen to influence the objective performance of your role as an independent expert witness
Cross-examination	An opportunity for the other side to put its version of events to the witness and raise any other relevant matters which are capable of undermining their evidence.
Disclosure	Based on natural justice, the process of revealing evidence held by one party to the other in the action.
Evidence	Documentary and other records and verbal statements that support or refute the allegations made
Expert witness	A registered nurse or registered midwife with expertise in and knowledge of a specialised area of nursing or midwifery practice; commissioned by the CEO of NMBI or by the legal representatives of the nurse or midwife to produce a report setting out a professional opinion on the matter in dispute
Factual witness	Generally, a layperson who was an eyewitness to an incident in the case or holds factual knowledge that is relevant to the case.

Term	Definition or description
Fitness to Practise Committee (FTPC)	Statutory committee of NMBI, comprising Board members and non-Board members, professional and lay members. This committee hears evidence about complaints referred by the PPC for inquiry.
Grounds of complaint	Complaints are referred by the PPC on one or more of nine grounds listed in Section 55(1) of the Nurses and Midwives Act 2011. Expert witnesses are typically asked to consider professional misconduct, poor professional performance and/or non-compliance with a code of professional conduct.
Hybrid inquiry	An inquiry at which some parties attend in person and others attend remotely
Immunity from suit	Protection of a witness that enables him or her to give their opinion freely
Independence	In relation to an expert witness, holding an objective and unbiased view based on factual observations
Inquiry	The investigation of a complaint under Part 8 of the Nurses and Midwives Act 2011; includes the hearing of the matter by a subcommittee of the FTPC
Legal assessor	Senior barrister or solicitor (not a member of the FTPC) who provides legal advice to the FTPC during the course of an inquiry
Letter of instruction	A letter from the CEO/panel law firm to the expert witness setting out what tasks they are expected to undertake
Non-compliance with a code of professional conduct	A failure to comply with one or more provision of the Code of Professional Conduct and Ethics published by NMBI (2014, 2021 or any subsequent edition)
Parties	The persons involved in the inquiry, namely the registrant, their representatives (if any), the CEO, the CEO's panel law firm the Fitness to Practise Committee and witnesses

Term	Definition or description
Poor professional performance	Defined in Section 2 of the Nurses and Midwives Act 2011 as “a failure by the nurse or midwife to meet the standards of competence (whether in knowledge and skill of 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.” The failure(s) should be considered a serious act or omission in order to amount to poor professional performance.
Preliminary Proceedings Committee (PPC)	Statutory committee of the Board of the NMBI. The PPC investigates the complaint it can decide to send to Stage 2 Fitness to Practise. Refer to NMBI Complaints against Nurses and Midwives on our website
Professional misconduct	Not defined in the Nurses and Midwives Act 2011; description drawn from case law Two “limbs” to professional misconduct: <ul style="list-style-type: none"> • Infamous or disgraceful conduct such as fraud or dishonesty or failings in duties towards colleagues or patients • A serious falling short of the expected standard; conduct connected with the nursing or midwifery profession in which the nurse or midwife concerned has seriously fallen short, by omission or commission, of the standards of conduct expected among nurses and midwives
Registrant	The registered nurse or registered midwife who is the subject of the complaint and the inquiry
Remote inquiry	A hearing at which all parties attend remotely using a nominated virtual platform
Representative (‘rep’)	A person who represents and acts on behalf of the CEO or the registrant
Retainer letter	A letter to the expert witness confirming the work to be undertaken and the fees to be charged
Subcommittee	A subcommittee of the FTPC

Introduction

The Nursing and Midwifery Board of Ireland (NMBI) is the regulatory body for the nursing and midwifery professions in Ireland. NMBI's mission is to protect the public by promoting high standards of professional education and training and professional conduct amongst nurses and midwives. We do this through the functions assigned to us under the provisions of the Nurses and Midwives Act 2011, as amended.¹

NMBI fulfils its functions by:

- maintaining the Register of Nurses and Midwives and a Candidate Register for student nurses and midwives
- setting the standards for the education of nurses and midwives
- approving programmes of education necessary for registration and monitoring these programmes on an ongoing basis
- supporting registrants by providing appropriate guidance on professional conduct and ethics for registered nurses and registered midwives (registrants)
- investigating and considering complaints against registrants.

Our role in setting standards and providing guidance for registered nurses and registered midwives in Ireland focuses on public safety. We work collaboratively with the Department of Health, employers, managers, trade unions, educators, other regulatory bodies and our registrants.

Preliminary Proceedings Committee

The role of the Preliminary Proceedings Committee is to give initial consideration to complaints. It can refer complaints to the Fitness to Practise Committee or make recommendations to the Board of NMBI that no further action be taken, or that the matter be referred to another body or authority, or to mediation. The Preliminary Proceedings Committee may also accept an undertaking and/or consent from a registrant who is the subject of a complaint.

¹The Nurses and Midwives Act 2011 (as amended) was signed into legislation on 21 December 2011. It has been updated and revised in accordance with other Acts, particularly Regulated Professions (Health and Social Care) (Amendment) Act 2020 and Emergency Measures in the Public Interest (Covid-19) Act 2020. The CEO has overall responsibility under the Act 2011 for the Fitness to Practise process, delegates some tasks to the PPC and FTP teams and Panel Law Firms.

Fitness to Practise Committee

The role of the Fitness to Practise Committee (FTPC) is to inquire into complaints referred by the Preliminary Proceedings Committee under Section 61 of the Nurses and Midwives Act 2011, as amended. On completion of an inquiry, the FTPC submits its report to the Board. The FTPC may find that factual allegations are proven and that one or more grounds on which the complaint was made were also proven, or it may alternatively find at an inquiry that no allegation against the registrant has been proven, in which case the FTPC will dismiss the complaint. The FTPC may also accept an undertaking and/or consent from a registrant at the early stages of an inquiry which will conclude the inquiry process promptly (although the undertaking and/or consent can in fact be proposed at any stage of the inquiry, including when significant evidence has already been heard).

The complaint will be heard by a subcommittee of the FTPC at a fitness to practise inquiry. The inquiry will usually take place in the NMBI offices in Blackrock, County Dublin. However, it is also possible that the inquiry will take place in a hybrid manner with certain parties attending in person and others attending remotely. The subcommittee of the FTPC that will hear the complaint made against the registrant usually comprises one nurse or one midwife and two lay members (i.e., persons who have never been registered as nurses or midwives); at least one of these three persons must be a Board member.

The FTPC will also be assisted by a legal assessor, who is a barrister and not a member of the FTPC. The legal assessor will be present to provide legal advice to the FTPC when required and to ensure that the inquiry is conducted in accordance with fair procedures.

An expert witness may be engaged by the Chief Executive Officer (CEO) of NMBI² in relation to a complaint regarding a registrant. Expert witnesses are engaged by the CEO of NMBI to produce an expert report to assist the FTPC in determining complaints against registrants involving matters in which the nurse or midwife members of the FTPC do not necessarily have the requisite technical or specialist knowledge. To assist the FTPC, an expert witness is asked to provide their opinion on whether the alleged conduct on the part of a registrant amounts to professional misconduct, poor professional performance and/or non-compliance with a code of professional conduct.³

This guidance document outlines the:

- role of the expert witness
- requirement for independence
- required competencies of an expert
- expert report.

² This includes the panel law firm instructed by the CEO.

³ On occasion, the Preliminary Proceedings Committee (PPC) may commission a report from an expert. The principles set out in this guidance apply in the same way to experts commissioned by the PPC as they do to experts instructed by the CEO at the FTPC stage of the process.

The role of the expert witness

The expert witness is a person whose level of specialised knowledge or skill in a particular field qualifies them to present their opinion about facts of a complaint to an inquiry proceeding.

Generally, a witness may only give evidence of fact, not of opinion (i.e., a factual witness). Expert witnesses are an exception to this general rule, as expert witnesses are required to give their professional opinion to the FTPC on the subject matter of a complaint.

Experts are engaged where their particular expertise is in an area in which the nurse or midwife members of the FTPC do not necessarily have the requisite technical or specialist knowledge. As the FTPC is a lay majority panel, in inquiries involving complaints concerning the care provided by a registrant (e.g., medication management, perinatal care etc), it may be necessary to engage an expert witness to assist the FTPC in making its decision about professional misconduct, poor professional performance and/or non-compliance with a code of professional conduct. The lay members of the FTPC should not defer to the nurse or midwife member of the FTPC for specialist information but instead should obtain the required information from an expert witness so that each member of the FTPC can make up their own mind on the relevant issue.

Accordingly, the expert witness is required to give an objective opinion and should be able to state the facts or assumptions on which your opinion is based. You should only give opinion evidence on matters within your particular specialism and in accordance with your professional competence. You should not give evidence on matters which fall outside your expertise.

Therefore, if you do not have enough information on which to reach a conclusion on a particular point, or if your opinion is qualified (i.e., in some way limited or restricted), your report should state this clearly.

Competencies of an expert witness

In respect of our fitness to practise inquiries, complaints can relate to conduct occurring in a variety of nursing and midwifery disciplines and specialities, such as (but not limited to):

- General nursing
- Psychiatric nursing
- Paediatric or neonatal nursing
- Intellectual disability nursing
- Nursing care of the older person
- Emergency department nursing
- Intensive care nursing
- Antenatal care, labour and birth care, and postnatal care (midwifery).
- Public health / community nursing
- Advanced nursing practice (peer to peer)
- Nurse prescribing of medicinal products
- Nurse referral of radiological procedures
- End of life care (palliative care) nursing

The key competency of an expert witness is the possession of the knowledge and expertise in a particular discipline, beyond that of a layperson, which enables them to form an expert opinion on a particular subject matter. Accordingly, it will be necessary for you to have the requisite degree of expertise in the branch of nursing or midwifery and speciality to which the complaint relates. For example, if the complaint relates to the care afforded to a resident of an intellectual disability unit by a specialist intellectual disability nurse, it is essential that you have expertise in this area. As well as having expertise and experience of the relevant area of nursing or midwifery practice, you should have a good understanding of the role, functions and guidance provided by NMBI.

The skills required of an expert relate to report writing and participating at an inquiry. These include good verbal and written communication, analytical and reasoning skills, IT skills, and understanding of GDPR and data security. The attributes of a good expert witness include personal integrity, trustworthiness and confidence. This is not an exhaustive list of the skills and attributes.

Nurses and midwives registered in the United Kingdom are also welcome to apply. However, nurse and midwives registered with NMBI will be given priority.

Independence of an expert witness

Although you have been engaged by the CEO to prepare a report and give evidence at the inquiry, you are an independent witness. Therefore, you have an overriding duty to the FTPC to give independent evidence. It is essential, therefore, that you approach the case objectively and that your view is based on factual observations.

Conflict of interest

A conflict of interest may arise if your personal interests, obligations or loyalties could influence or be seen to influence the objective performance of your role as an independent expert witness. Examples of actual conflicts of interest include knowing the registrant personally or working in the same location as one of the parties. If you believe that you have an actual or potential conflict, either now or at any stage during the course of this inquiry, please let the CEO know immediately so that we can discuss the matter further.

Applying to be an expert witness

In order for the CEO to decide whether a nurse or midwife is a suitable expert to be instructed in respect of a particular matter, the potential expert witness is required to provide the CEO with their CV prior to being instructed. Accordingly, your CV should contain details of your professional qualifications, accreditations and training, and a list of your past and present professional positions.

You should also provide details of the following in your CV:

- Principal professional specialisms
- Awards, accolades and other professional responsibilities
- Memberships of professional organisations
- Research publications
- Training, qualifications and accreditation as an expert witness.

Please ensure that your CV is well formatted and does not contain spelling errors or inaccurate contact details.

If you would like further information about the expert witness panel and what is involved, you can contact FTP@NMBI.ie. Suitable individuals will then be included on the NMBI expert witness panel. Please note that there is no guarantee of work arising from being placed on the panel.

Details of NMBI's FOI and GDPR policies can be found at www.nmbi.ie/What-We-Do/Freedom-of-Information.

Further reading

Citizens Information: www.citizensinformation.ie

Complaints (NMBI): www.nmbi.ie/Complaints

Conflict of interest (sample): <https://www.ucc.ie/en/ocla/policy/conflict-of-interest/faq/#what-is-a-conflict-of-interest>

Expert Witness Institute: www.ewi.org.uk

Irish Statute Book: www.irishstatutebook.ie

Nursing and Midwifery Board of Ireland: www.nmbi.ie

Nursing and Midwifery Board of
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