

PROFESSIONAL REGULATION – A NEW MODEL LAW

PART I

Definitions

1. In this Act,

“*poor professional performance*”¹, in relation to a registrant, means a failure by the registrant to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both, or otherwise) that can reasonably be expected of registrants practising []² of the kind practised by the registrant.

“*professional misconduct*”³, in relation to a registrant, means conduct that is infamous or disgraceful in a professional respect (notwithstanding that, if the same or like act, omission or pattern of conduct were committed by a member of another profession, it may not be professional misconduct in respect of that profession),

“*relevant medical disability*”, in relation to a registrant, means a physical or mental disability of the registrant (including addiction to alcohol or drugs) which may impair the registrant’s ability to practise [] or a particular aspect thereof.

The Preliminary Proceedings Officer

2. The Council⁴ shall appoint a Preliminary Proceedings Officer⁵ to give initial consideration to complaints, and perform the functions that are assigned under Part 2 to the Preliminary Proceedings Officer.

The Fitness to Practise Committee

3. (1) The Council shall establish a committee of the Council to be known as the Fitness to Practise Committee, to inquire into complaints, and perform the functions under Part 3 that are assigned to the Fitness to Practise Committee.

(2) The Fitness to Practise Committee shall include in its membership persons who are not members of Council.

¹ This definition retains the wording currently used in professional regulatory statutes for poor professional performance.

² Insert appropriate profession.

³ This repeats the pre-*O’Laoire* and traditional test for professional misconduct with the intention that conduct issues will be dealt with as “*professional misconduct*”, and competence issues as “*poor professional performance*”.

⁴ The Model Law envisages a Council in the normal way and an Act which will have to make provision for registration.

⁵ Controversially, I propose the replacement of the Preliminary Proceedings Committee by a single person, designated the Preliminary Proceedings Officer. This is intended to streamline the process, reduce costs and time, and to ensure more consistency in the making of *prima facie* decisions.

(3) The Chairperson of the Fitness to Practise Committee shall be a member of Council other than the President or Vice-President of Council.

(4) At least one third⁶ of the members of the Fitness to Practise Committee shall be members of Council.

(5) At least two thirds⁷ of the membership of the Fitness to Practise Committee shall be registrants.

(6) The Fitness to Practise Committee shall be entitled to regulate its own procedure.

(7) The *quorum* of a Fitness To Practise Committee panel considering a complaint against a registrant shall include at least one person who is not a registrant⁸.

(8) The members of the Fitness to Practise Committee, in performing the functions under this Act respectively conferred on—

(a) the members in their capacity as such members, or

(b) the Fitness to Practise Committee of which they are members,

shall have the same protection and immunity as a judge of the High Court performing the functions of a judge.

PART II

Complaints

4. (1) Any person may make a complaint to the Preliminary Proceedings Officer concerning a registrant on one or more than one of the grounds of-

(a) professional misconduct,

(b) poor professional performance,

(c) a relevant medical disability,

(d) a failure to comply with a relevant condition,

(e) a failure to comply with an undertaking or to take any action specified in a consent given in response to a request under section 13,

⁶ Although the Model Law removes much responsibility for professional regulation from the Council, it also retains a substantial Council membership on the Fitness to Practise Committee.

⁷ A further controversial change is the removal of a lay majority from the Fitness to Practise Committee. I suggest that the introduction of lay majorities in professional regulation has not been a success in that lay persons are less familiar with the subject matter of complaints, and less strict on registrants who do not meet the profession's standards.

⁸ This is intended to ensure that at least one lay person sits on each panel hearing a complaint.

(f) a contravention of a provision of this Act (including a provision of any regulations or rules made under this Act), or

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

(2) A complaint may be made under section 4 (1) notwithstanding that the matter to which the complaint relates occurred outside the State, or before the commencement⁹ of this Act.

(3) A complaint may be made and considered¹⁰ under this Act concerning a registrant whose name is no longer registered, or who was not registered at the time of the events or matter giving rise to the complaint.

(4) Where a registrant is convicted in the State of an offence triable on indictment¹¹ or is convicted outside the State of an offence consisting of acts or omissions which would constitute an offence triable on indictment if done or made in the State,

(a) the Fitness to Practise Committee may, on the application of the Chief Executive Officer pursuant to this section, and following consideration of submissions by the Chief Executive Officer, and the registrant, decide that the name of such person should be cancelled,

(b) Where the Fitness to Practise Committee decide pursuant to section 4(4)(a) that the registrant's registration should be cancelled, the provisions of sections 18, 19 and 20 shall apply as if the decision to cancel the registrant's registration were made under section 16.

(c) Where the Fitness to Practice Committee do not decide to cancel the registrant's registration pursuant to section 4(4)(a) above, the matter shall be treated as a complaint by the Chief Executive Officer to the Preliminary Proceedings Officer pursuant to section 4(1)(g) above.

Case Officers to assist the Preliminary Proceedings Officer

5. (1) The Council¹²—

(a) may appoint persons (including any members of the staff of the Council other than the chief executive officer) to assist the Preliminary Proceedings Officer, and

(b) shall determine the conditions of appointment of persons so appointed.

⁹ This is to ensure that pre-commencement conduct can be considered under this legislative scheme.

¹⁰ This section tries to prevent a registrant from evading

¹¹ This section is to preserve the long standing jurisdiction to cancel registration on a summary basis where there has been a conviction on an indictable offence.

¹² This section replicates the existing provisions for case officers.

(2) The Preliminary Proceedings Officer shall specify the functions to be performed by the persons appointed under subsection (1).

(3) Without prejudice to the generality of subsection (2), the functions specified under that subsection may include one or more than one of the following:

(a) interviewing persons for the purposes of assessing the relevance or evidential value of information or documents they wish to give to the Preliminary Proceedings Officer,

(b) interviewing persons as to the evidence they propose to give to the Preliminary Proceedings Officer,

(c) recording, in writing or otherwise, the statements given and answers made by persons whilst being so interviewed;

(d) reporting to the Preliminary Proceedings Officer on the results of those interviews;

(e) requesting persons to provide the Preliminary Proceedings Officer with statements in writing concerning any matter relevant to the Officer's functions and examining statements given in response to the requests; and

(f) providing the Preliminary Proceedings Officer with any other advice or assistance required in relation to the exercise of his or her functions.

Consideration of complaint by Preliminary Proceedings Officer

6. (1) The Preliminary Proceedings Officer shall, as soon as is practicable after receiving a complaint, consider whether there is a *prima facie*¹³ case to warrant further action being taken in relation to the complaint.

(2) The Preliminary Proceedings Officer shall give notice in writing to the registrant the subject of a complaint of the complaint, its nature and the name of the complainant.

(3) The registrant the subject of a complaint may supply to the Preliminary Proceedings Officer any information that the registrant believes should be considered by the Officer or the Fitness to Practise Committee.

(4) Where a complaint is withdrawn while it is being considered by the Preliminary Proceedings Officer, the Officer may—

(a) decide that no further action is to be taken in relation to the matter the subject of the complaint, or

¹³ There is a very slight change of terminology here to reflect the common used phrase "*prima facie* case".

(b) proceed as if the complaint had not been withdrawn.

(5) Section 12(1)(c), (in so far as it relates to the discovery and/or production of documents) shall apply to and in relation to the Preliminary Proceedings Officer as that subsection applies to and in relation to the Fitness to Practise Committee and the chairperson of the Fitness to Practise Committee.

Immediate suspension applications

7. (1) The Chief Executive Officer¹⁴ may make an *ex parte* application to the High Court for an order to suspend the registration of a registrant, whether or not the registrant is the subject of a complaint, if the Chief Executive Officer considers that the suspension is necessary to protect the public until steps or further steps are taken under this Part and, if applicable, Part 3.

(2) An application under subsection (1) shall be heard otherwise than in public unless the High Court considers it appropriate to hear the application in public.

(3) The High Court may determine an application under subsection (1) by making any order it considers appropriate, including an order suspending the registration of the registrant the subject of the application for the period specified in the order, and an order for costs¹⁵.

Procedure on finding of no prima facie case

8. (1) Where the Preliminary Proceedings Officer is, in respect of a complaint, of the opinion that there is not sufficient cause to warrant further action being taken in relation to the complaint, it shall inform the Council, the registrant, and the complainant of that opinion.

(2) The Council¹⁶ may, after considering an opinion referred to in subsection (1) in respect of a complaint decide that no further action is to be taken in relation to the complaint or direct that further action be taken under section 9.

Referral to Fitness to Practise Committee

9. Where—

(a) the Preliminary Proceedings Officer is of the opinion that there is a *prima facie* case to warrant further action being taken in relation to a complaint, or

¹⁴ I suggest that these applications are made by the Executive and not the Council as is provided for in current professional regulatory statutes. In most cases, it is fairly clear whether an application should be brought, and if this is an executive decision, it will reduce costs and time.

¹⁵ Specific power to grant costs is included.

¹⁶ This is in effect an appeal against a no *prima facie* finding. Consideration might be given to including a provision that the views of a complainant be considered by Council before it comes to a decision, although most Council's will take such views into account.

(b) the Council directs under section 8 that further action be taken under this section in relation to a complaint,

the Preliminary Proceedings Officer shall refer the complaint to the Fitness to Practise Committee.

PART III

Notification of registrant

10. (1) The chief executive officer shall, as soon as is practicable after a complaint is referred under section 9 to the Fitness to Practise Committee, give notice in writing to the registrant the subject of the complaint of the following:

(i) the referral of the complaint to the Fitness to Practise Committee;

(ii) the nature of the matter that is to be the subject of the inquiry, including the particulars of any evidence in support of the complaint;

(iii) the opportunity of the registrant, or the registrant's representative, to be present and to defend the registrant at the hearing; and

(2) The chief executive officer shall give notice in writing to the registrant the subject of a complaint referred to the Fitness to Practise Committee of the date, time and place of the hearing of the complaint in sufficient time for the registrant to prepare for the hearing.

Conduct of hearing

11. (1) The Fitness to Practise Committee shall hear a complaint referred to it under section 63 .

(2) A hearing before the Fitness to Practise Committee¹⁷, or any part thereof, may be held in private or in public, and the Fitness to Practise Committee shall have power to direct that the names of the complainant, the registrant, any witnesses, or persons referred to at the hearing shall be anonymised during the course of the hearing and in any report under section 15.

(3) At the hearing of a complaint before the Fitness to Practise Committee—

(a) the chief executive officer, or any other person with leave of the Committee, shall present the evidence in support of the complaint,

¹⁷ The intention is to give the Fitness to Practise Committee the widest jurisdiction possible to decide whether to hold the inquiry in private or in public.

(b) the testimony of witnesses attending the hearing shall be given on oath, or in such other manner as is directed by the Fitness to Practice Committee¹⁸, and

(c) there shall be a full right to cross-examine witnesses and call evidence in defence and reply.

(4) Any member of the Fitness to Practise Committee may administer oaths for the purposes of an inquiry.

(5) The Fitness to Practise Committee shall, in considering whether an allegation is proven, apply the civil standard of proof¹⁹.

Powers and protections

12²⁰. (1) For the purposes of an inquiry, the Fitness to Practise Committee has all the powers, rights and privileges that are vested in the High Court or a Judge of the High Court on the occasion of an action and that relate to—

(a) enforcing the attendance of witnesses,

(b) examining witnesses on oath or otherwise, and

(c) compelling the discovery²¹ and/or production of documents.

(2) Without prejudice to the generality of subsection (1), a summons issued by the chairperson of the Fitness to Practise Committee or by such other member of that Committee as is authorised by it for the purpose of the inquiry may be substituted for and is the equivalent of any formal process capable of being issued in an action for enforcing the attendance of witnesses and compelling the discovery of or production of documents.

(3) Subject to necessity of observing fair procedures, the Fitness to Practise Committee may receive evidence given—

(a) orally before the committee,

(b) by affidavit, or

(c) as otherwise allowed by the Fitness to Practise Committee, including by means of a live video link, a video recording, a sound recording or any other mode of transmission.

¹⁸ This additional wording is to reflect the principles set out in *Kiely v Min for Social Welfare* on the admission of evidence in such tribunals.

¹⁹ In the absence of express provision in the statute, it is unlikely that this change could be effected by a Fitness to Practice Committee. It is unlikely to change the result of many inquiries.

²⁰ In general, this section replicates the provisions of section 66 of the Medical Practitioners Act, 2007.

²¹ This rewording reflects the fact that it is discovery, not production, that is most useful for such inquiries. In addition, the wording refers to documents not records.

(4) A witness before the Fitness to Practise Committee is entitled to the same immunities and privileges as a witness before the High Court.

(5) Where a person fails to comply with a summons²² to attend before the Fitness to Practise Committee or refuses, while attending as a witness before the Fitness to Practise Committee, to do anything referred to in subsection (5)(b) that the person is lawfully required by the Committee to do, the Court, on application by the Chief Executive Officer may—

(a) by order require the person to attend before the Committee or to do the thing that the person refused to do, as the case may be, and

(b) make such interim or interlocutory orders as it considers necessary for that purpose.

(c) make such order as to costs as seems appropriate to the High Court.

Undertakings and consents

13. (1) The Fitness to Practise Committee may, at any time after a complaint is referred to it, request the registrant the subject of the complaint to do one or more than one of the following:

(a) if appropriate, undertake to not repeat the conduct the subject of the complaint,

(b) undertake to be referred to a professional competence scheme and to undertake any requirements relating to the improvement of the registrant's competence and performance which may be imposed,

(c) consent to undergo medical treatment,

(d) consent to being advised, admonished or censured²³.

(2) Where a registrant refuses to give an undertaking or consent the subject of a request under subsection (1) by the Fitness to Practise Committee, the Committee may proceed as if the request had not been made.

(3) Where a registrant gives an undertaking or consent the subject of a request under subsection (1) by the Fitness to Practise Committee, the inquiry shall not proceed further and shall be at an end²⁴.

²² The reference to a criminal offence is removed. It is never invoked.

²³ There are often cases where advice, or admonishment will be appropriate rather than censure.

²⁴ This is a "for the avoidance of doubt" section, which removes the question as to whether the "sanction" effected by an undertaking and consent needs to be approved by the Council or the Court. There may be a small number

Withdrawal of complaint

14. Where a complaint is withdrawn while it is being considered by the Fitness to Practise Committee, the Committee may:
- (a) decide that no further action is to be taken in relation to the matter the subject of the complaint, or
 - (b) proceed as if the complaint had not been withdrawn.

Report of the Fitness to Practise Committee

15. (1) The Fitness to Practise Committee shall, on completing an inquiry into a complaint, prepare a report in writing on its findings.
- (2) The report referred to in subsection (1) of the Fitness to Practise Committee—
- (a) shall specify—
 - (i) the nature of the complaint that resulted in the inquiry,
 - (ii) the evidence presented to the Committee, and
 - (iii) the Committee's findings as to whether any allegation is proved,
- and
- (b) may include such other matters relating to the registrant the subject of the complaint as the Committee considers appropriate.
- (3) The report of the Fitness to Practise Committee shall be furnished to the registrant, the Council, and the complainant²⁵.
- (4) Where the Fitness to Practise Committee find that no allegation has been proven against the registrant, the complaint shall stand dismissed.

Decision on Sanction

16. Where the Fitness to Practise Committee have found that some or all of the allegations against a registrant have been proved, the Committee²⁶ may²⁷, after

of cases where the Committee accepts an undertaking where it should not do so. It seems unwieldy to create an appeals structure to deal with what must be a small number of cases.

²⁵ It may be necessary to include a power to redact portions of the report as furnished to the complainant.

²⁶ A further controversial change to the current position is the proposal that the Fitness to Practice Committee would make a decision on sanction, not the Council. This is intended to again reduce costs and time, and perhaps more importantly ensure that the persons who heard and determined the complaint would make the primary decision on sanction.

²⁷ The word "shall" is replaced by "may". There is no longer an obligation to impose a sanction.

considering submissions from the chief executive officer and the registrant, decide that one or more than one of the following sanctions be imposed on the registrant:

- (a) an advice or admonishment, or a censure, in writing;
- (b) a censure in writing and a fine not exceeding €5,000;
- (c) the attachment of conditions to the registration of the registrant including restrictions on the practice of [] that may be engaged in by the registrant
- (e) the suspension of the registrant's registration for a specified period;
- (f) the cancellation of the registrant's registration;
- (g) a prohibition from applying for a specified period for the restoration of the registrant's registration.

Communication of decision on sanction

17. The Committee shall, as soon as is practicable after deciding under section 16 whether to impose a sanction on a registrant, give notice in writing to the registrant and, in any case where neither the Council nor the Chief Executive Officer is not the complainant, the complainant, of—
- (a) the nature of the sanction that the Committee has decided to impose, if any,
 - (b) the date on which the decision was made, and
 - (c) the reasons for the imposition of the sanction, and
 - (d) the manner in which the registrant may appeal against the decision.

Confirmation by High Court required

18. A decision under section 16 to impose a sanction on a registrant shall not take effect unless the decision is confirmed by the High Court on an application under sections 19 or 20.

Appeal to the High Court

19. (1) A registrant the subject of a report by the Fitness to Practice Committee and/or decision under section 16 may, not later than 21 days after the registrant received notice under section 17 of the decision, appeal to the High Court against any

decision by the Fitness to Practice Committee that an allegation, or allegations were proved²⁸, or to impose a sanction on the registrant.

(2) The High Court shall have jurisdiction²⁹ to extend the time for making an appeal up and until such time as the decision is confirmed under section 20 below.

(3) The Court may, on the hearing of an appeal under subsection (1) by a registrant consider any evidence adduced or argument made, whether or not adduced or made to the Fitness to Practise Committee.

(4) The Court may, on the hearing of an appeal under subsection (1) by a registrant—

(a) either—

(i) confirm the finding of the Fitness to Practice Committee and/or their decision as to sanction, as appropriate, or

(ii) cancel the finding of the Fitness to Practice Committee and/or their decision as to sanction and replace them with such other findings or decision as the High Court considers appropriate, which may for the avoidance of doubt be a decision—

(I) to impose a different sanction on the registrant, or

(II) to impose no sanction on the registrant,

and

(b) give such directions as the Court considers appropriate and direct how the costs of the appeal are to be borne.

(5) Following the conclusion of an appeal under section 19, the Council shall notify the registrant and the complainant of the findings, decision and order of the High Court.

Confirmation applications

20. (1) Where a registrant, within the period allowed under section 19 (1), does not appeal to the High Court as provided for in section 19, the Chief Executive Officer shall, as soon as is practicable after the expiration of that period, make an application to the High Court for the confirmation of the decision, and for the costs of such application.

²⁸ Although the case law suggests that appeals are full de novo hearings, the wording of the statutes suggests that they are appeals only against sanction. This appeal section clarifies this. As there is no longer an obligation to impose a sanction, there may be some cases where it is in fact the finding that is to be challenged.

²⁹ There is some ambiguity in the statutes and case law as to whether the time for appealing can be extended. Given the seriousness of the sanctions available, it must surely be fair to allow an extension if appropriate.

(2) An application under subsection (1) may be made on an *ex parte* basis, save that the High Court shall not make an order for costs of the application pursuant to section 20(1) on an *ex parte* basis.

(3) The High Court shall, on the hearing of an application under subsection (1), confirm the decision under section 71 the subject of the application unless the Court sees good reason not to do so.

(4) If the High Court, on the hearing of such an application, sees good reason not to confirm the decision of the Fitness to Practice Committee pursuant to section 16, the High Court shall have power to cancel that decision and replace it with such other decision as the High Court considers appropriate³⁰, which may be a decision—

(I) to impose a different sanction on the registrant, or

(II) to impose no sanction on the registrant,

(5) Following the conclusion of an application under section 20, the Council shall notify the registrant and the complainant of the findings, decision and order of the High Court.

Finality of decision of the High Court

21. The decision of the High Court on an appeal under section 19 or an application under section 20 is final except that the Council or the registrant to whom the decision relates may, by leave of the High Court or the Court of Appeal, appeal against the decision to the Court of Appeal on a specified question of law.

Notification provisions

23. (1) The Council shall give notice in writing to the Minister³¹ and [³²] as soon as is practicable after any sanction³³ takes effect under this part.

(2) Where it comes to the Council's attention that, under the law of a state other than the State, a measure corresponding to one referred to in section 16 has been taken in relation to a registrant, the Council shall, as soon as is practicable, give notice in writing to the Minister and the [] of the measure.

(3) The Council shall give notice in writing to an employer (other than the Health Service Executive) where:

³⁰ Given that Committees sometimes recommend inadequate sanctions, it is important to allow the High Court intervene in an appropriate case.

³¹ This will be the Minister with responsibility for the profession in question.

³² In the Healthcare and Allied Professions, this will be the HSE. There may be other appropriate bodies for other professions.

³³ The suggested notification provisions are broader than in current legislation. It is hard to see why the provisions should be more restrictive.

- (a) it comes to the Council's attention that any measure referred to in section 16 has been taken in relation to a registrant employed by the employer, and
- (b) the employer's name is known to the Council.

(4) Where

- (a) Any measure referred to in section 16 has been taken in relation to a registrant, and
- (b) the Council has reason to believe that—
 - (i) the registrant is registered in another jurisdiction, and
 - (ii) those measures may not have come to the attention of the body duly authorised to perform functions in that jurisdiction that correspond to the functions of the Council,

the Council shall give notice in writing to that body of those measures.

Publication of findings

24. The Fitness to Practice Committee shall, if satisfied that it is in the public interest to do so, advise the public when findings have been made or sanction imposed against a registrant, and shall be at liberty to publish the report of the Fitness to Practise Committee, the transcripts of any evidence given, any documents adduced in evidence or any other matter, or documents, which material may be redacted in whole or in part as the Fitness to Practice Committee thinks necessary.

Hearing before the High Court or Court of Appeal

25. Any proceedings or hearing³⁴ before the High Court, or Court of Appeal, pursuant to sections 19 or 20, may be held in private or in public, and the High Court or Court of Appeal shall have power to direct that the names of the complainant, the registrant, any witnesses, or persons referred to at the hearing shall be anonymised during the course of the hearing and in any judgment.

³⁴ The Court should have full power to decide issues of privacy and confidentiality in matters before it.