



Submission to the Department of Health and Children

Consultation on proposed new Nurses and Midwives legislation

S/08/002

January 2008



The Competition Authority
An tÚdarás Iomaíochta

1. INTRODUCTION

Competition Policy and New Regulation

- 1.1 The Competition Authority broadly welcomes the proposed legislation as another important step in updating the body of legislation applicable to medical professionals. It is especially relevant at present, as the Competition Authority is currently studying competition in the medical profession and there are obvious links between these professions.
- 1.2 The proposed legislation introduces very important and welcome changes in the legislation applicable to Nurses and Midwives. However, the Competition Authority has a number of concerns, and hopes that the comments in this submission will be reflected in the final drafting of the new Bill.

Structure of Submission

- 1.3 This submission is divided into four subsections which relate to four parts of the Nurses Act, 1985:
- Part II: An Board Altranais;
 - Part III: Registration;
 - Part V: Fitness to Practise; and,
 - Part VI: Miscellaneous.

A summary list of recommendations is on page 6.

2. DETAILED COMMENTS

Part II: An Bord Altranais

- 2.1 The Competition Authority particularly welcomes **Heads 3** and **5** of the proposed legislation. In both Heads, one welcome aim clearly stands out - the prime role of An Bord Altranais is to be the protection of the public interest and not, for example, the representation of the profession. This clarity is something that the Competition Authority has been advocating in its recent work on competition in the professions.¹
- 2.2 **Head 3** makes it clear that the new function of the Board is to protect the public. However, it could be further improved if the actual functions of the Board were also spelled out under this Head, in line with most modern similar legislation.
- 2.3 **Head 5** rebalances the Board membership so that practising professionals will not form a majority of the Board, and this is especially welcome.
- 2.4 Although the Competition Authority also welcomes (in **Head 7**) the fact that both the Fitness to Practise and the Preliminary Proceedings Committee will have a non-nursing/non-midwife majority, some concerns remain. First, some of the subheads refer to "the Preliminary Proceedings Committee" and "the Fitness to Practise Committee" whereas others talk about "a" Committee, as if there could be more than one of each.

This wording problem is not trivial, as it could suggest that there could indeed be several Fitness to Practise Committees and several Preliminary Proceedings Committees, thereby creating the potential for damaging inconsistency. In the Competition Authority's view, there should only be one Fitness to Practise Committee, and one Preliminary Proceedings Committee. Inconsistency would also arise from the fact that (contrary to what the explanatory note to the Head says) this provision would not be consistent with Section 20(7) of the Medical Practitioners Act 2007.

- 2.5 In **Head 7(15)**, three out of five members of the new Midwives Committee will have to be midwives, i.e. a majority. This provision appears at odds with other provisions of the Bill, i.e. in the case of the Board itself, and its Preliminary Proceedings and Fitness to Practise Committees, it is expressly provided that neither nurses nor midwives should be in the majority. This requires clarification, and perhaps amendment.

That this needs clarification is underpinned by the vague and general nature of the proposed functions of the Midwives Committee.

- 2.6 **Head 18(4)** requires the Board to ensure that a draft of any rule that it proposes to make is "*published in the prescribed manner*". However, **Head 2** defines "prescribed" to mean "*prescribed by rules made by the Board*". These definitions suffer from the problem of 'circularity', and this needs to be rectified.

¹ See <http://www.tca.ie/PromotingCompetition/MarketStudies/MarketStudies.aspx>.

This leads to the problem that the Board could, if it wished, adopt rules under Heads 2 and 18 providing for extremely limited publication of its draft rules. The Competition Authority therefore further recommends that some minimum form of publication of draft rules should be specified in the legislation itself – ideally specifying “the public” as a target audience. Good precedents which could be followed are section 11(5)(b) of the Medical Practitioners Act 2007 and section 11(6)(b) of the Pharmacy Act 2007.

Part III: Registration

- 2.7 **Head 19(3)(b)** provides that midwives will have their own Division of the Register. However, it is not clear what Head 19 adds to the existing provisions of the Nurses Act 1985 in this respect, given that Section 27(1) of that Act already provides expressly for a midwives division on the Register. This should be further clarified.
- 2.8 **Head 19(5)** provides that the Board must publish the register of nurses and midwives at least annually. The register should also be available on the Internet, as is the case for the Pharmacy Act 2007.²

Part V: Fitness to Practise

- 2.9 The disciplinary provisions in many of the Heads³ provide for sanctions for “professional misconduct”. The Competition Authority has regularly observed in similar cases that this expression is too vague and could, conceivably, include behaviour which could be construed as pro-competitive, e.g. advertising (although some professionals may consider this to be ‘disreputable’). The Pharmacy Act 2007 attempted to address this issue by defining professional misconduct⁴, and the operative part of that provision reads as follows:

“professional misconduct”, in relation to a registered pharmacist, means any act, omission or pattern of conduct that—

.....
(b) 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 would not be professional misconduct in respect of that profession),
(c) involves moral turpitude, fraud or dishonesty of a nature or degree which bears on the carrying on of the profession of a pharmacist,

.....
but does not include an act, omission or pattern of conduct that consists of a wrongly but honestly formed professional judgment;”

The Competition Authority recommends that the proposed legislation for nurses and midwives should follow this provision.

² Section 13(2) of the Pharmacy Act 2007

³ See Heads 7, 16, 25, 26 and 46.

⁴ See Section 33 of the Pharmacy Act 2007.

Part VI: Miscellaneous

2.10 **Head 58(a)(2)** says that it will be a new function of the Board to “*give professional leadership, guidance and support*”. However, requiring the Board to “lead” and “support” the professions of nursing and midwifery could lead to a conflict of interest, given that its main objective is protecting the public interest – in other words it potentially (and wrongly, in the Competition Authority’s view) combines a professional leadership role with a regulatory role. In the Authority’s view, these are not proper bedfellows.

2.11 **Head 58(c)(5)** requires the Board to publish a Code of Practice. This will not regulate the behaviour of nurses and midwives as such, but appears aimed at regulating the various relationships **between the Board** and

- its own Board members,
- nurses and midwives in general, and
- the public in general.

It therefore has more of the character of a “Customer Charter” for those with whom the Board interacts, rather than the more standard Code to guide the Ethical behaviour of those whom it regulates. While that in itself would of course be a good thing, provision should also be made for the Board to adopt an enforceable Code of Ethics for Nurses and Midwives.

3. SUMMARY LIST OF RECOMMENDATIONS

Recommendation 1:

Head 3: The actual functions of the Board should be spelled out under this Head.

Recommendation 2a:

Head 7: Amend to make clear that there will be only one Preliminary Proceedings Committee and only one Fitness to Practise Committee.

Recommendation 2b:

Head 7(15): Clarify the intention as to whether midwives are intended to form a majority of the Midwives Committee – particularly given the vague nature of the latter's functions.

Recommendation 3

Head 18(4): Some minimum form of publication by the Board of draft rules it proposes to make should be specified in the legislation itself – ideally specifying "the public" as a target audience.

Recommendation 4a:

Head 19(3)(b): Clarify what the new legislation proposes to add to the existing provision of the Nurses Act 1985 (Section 27(1)), in relation to the "separate identity" of midwives.

Recommendation 4b:

Head 19(5): The register(s) of nurses and midwives should be required to be made available on the Internet.

Recommendation 5:

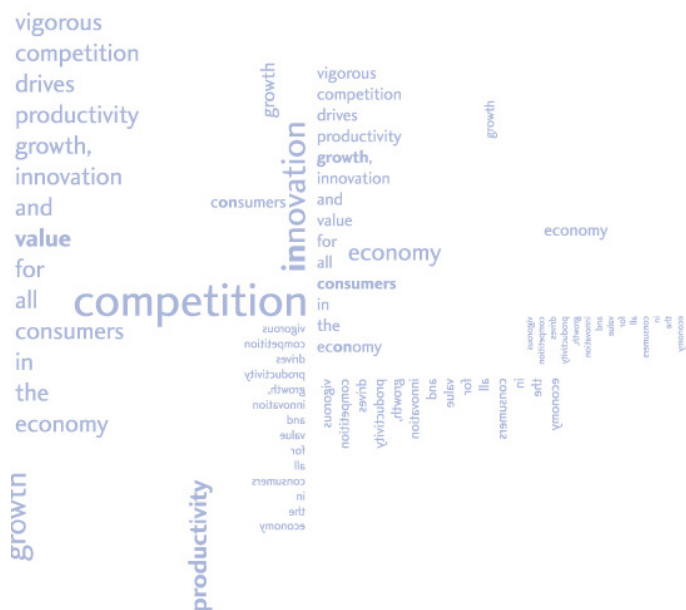
Heads 7, 16, 25, 26 and 46: The term "professional misconduct" should be defined along the lines of section 33 of the Pharmacy Act 2007.

Recommendation 6:

Head 58(a): The functions of "leadership" and "support" of the nurses and midwives professions are not appropriate to a regulatory / registration / disciplinary body, and should be omitted.

Recommendation 7:

Head 58(c)(5): If a Code of Conduct is intended here, to regulate the (ethical etc.) conduct of nurses and midwives, this needs to be made clear.



The Competition Authority, Parnell House, 14, Parnell Square, Dublin 1, Ireland
 Tel: +353 (0)1 8045400 LoCall 1890 220224 e-mail: info@tca.ie

www.tca.ie