

**Nursing and Midwifery Council
Fitness to Practise Committee**

Substantive Meeting

14 April 2020

Virtual meeting

Name of registrant:	Ian Macphail
NMC PIN:	02A0130S
Part(s) of the register:	Nursing, Sub part 1 RNA, Registered Nurse- Adult (20 December 2004) Recordable qualifications V300: Nurse independent / supplementary prescriber (29 May 2010)
Area of Registered Address:	Scotland
Type of Case:	Conviction
Panel Members:	Paul Powici (Chair, lay member) Amy Noakes (Registrant member) Peter Wrench (Lay member)
Legal Assessor:	Robert Frazer
Panel Secretary:	Rob James
Facts proved:	All
Facts not proved:	None
Fitness to practise:	Impaired
Sanction:	Striking off order
Interim Order:	Interim suspension order (18 months)

Details of charge:

That you, a registered nurse:

- 1) On 11 June 2019 at Dundee Sherriff Court, were convicted of the following:
 - i) Between 4 October 2007 and 6 October 2017, both dates inclusive, at 22 Victoria Street, Newport-on-Tay, you did have in your possession indecent photographs or pseudo-photographs of children contrary to the Civic Government (Scotland) Act 1982 S52A(1);
 - ii) Between 2 October 2007 and 29 August 2012, both dates inclusive, at 22 Victoria Street, Newport-on-Tay you did take or permit to be taken or make indecent photographs or pseudo-photographs of children contrary to the Civic Government (Scotland) Act 1982 S52(1)(a) as amended and:
 - iii) Between 2 October 2007 and 24 August 2012, both dates inclusive, at 22 Victoria Street, Newport-on-Tay, you did distribute or show indecent photographs or pseudo-photographs of children contrary to the Civic Government (Scotland) Act 1982 S52(1)(b) as amended.

AND in light of the above, your fitness to practise is impaired by reason of your conviction.

Determination on service:

The panel has considered all the information provided and has heard and accepted the advice of the legal assessor.

The panel has concluded that service of notice has been effected in accordance with the Rules. The letter giving notice was posted by the Royal Mail 'signed for' service on

17 February 2020 to the registered address of Mr Macphail, stating that a substantive meeting would take place on or after 23 March 2020.

The panel is satisfied that, in accordance with Rules 11(A) and 34 of the NMC Fitness to Practise Rules 2004, service of notice has been duly effected and sufficient notice has been given as required by the Rules.

Background

The NMC received a referral from Mr Macphail on 5 June 2018. At the time of the referral Mr Macphail was employed as a Band 5 Nurse at NHS Tayside Renal Service (“the Trust”). Mr Macphail joined the trust on 30 November 2015 and his employment was terminated on 21 June 2018.

Mr Macphail informed the NMC that on 1 June 2018 he was arrested and subsequently charged with three separate offences involving the possession and distribution of indecent images of children.

The background to Mr Macphail’s arrest was that police received information that the internet connection at the Registrant’s home address had been used to access indecent images of children. As a result of this information, a warrant was executed at the Registrant’s address and the Registrant’s laptop was seized. Several hundred indecent images of children were found including images in the highest category A.

The Cat A images depicted mainly young children, including babies, being sexually penetrated by adult males. Within the information retrieved, the police downloaded a folder which was entitled ‘S’ and this folder provided evidence of the exchange of indecent images with 11 separate Yahoo account users. These particular images were sent between 24 June 2010 and 24 August 2012.

Mr Macphail appeared at Dundee Sheriff Court on 11 June 2019 and pleaded guilty to all 3 charges and was sentenced to a community payback order requiring him to complete 180 hours of unpaid community service together with supervision for 3 years. In addition Mr Macphail must comply with notification requirements in accordance with the Sexual Offences Act 2003 and was made subject to the Protecting the Vulnerable Groups Scheme.

Decision on the findings on facts and reasons

The charges concern Mr Macphail's convictions and, having been provided with a copy of the certificate of conviction, the panel finds that the facts are found proved in accordance with Rule 31 (2) and (3) of the Rules which states:

- (2) Where a registrant has been convicted of a criminal offence—
 - (a) a copy of the certificate of conviction, certified by a competent officer of a Court in the United Kingdom (or, in Scotland, an extract conviction) shall be conclusive proof of the conviction; and
 - (b) the findings of fact upon which the conviction is based shall be admissible as proof of those facts.
- (3) The only evidence which may be adduced by the registrant in rebuttal of a conviction certified or extracted in accordance with paragraph (2)(a) is evidence for the purpose of proving that she is not the person referred to in the certificate or extract.

Decision on impairment

The panel next went on to decide if as a result of this conviction, Mr Macphail's fitness to practise is currently impaired.

The panel accepted the advice of the Legal Assessor on this issue.

Nurses occupy a position of privilege and trust in society. To justify that trust, nurses must be honest and open and act with integrity. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession. In this regard the panel considered the judgement of Mrs Justice Cox in the case of Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin) in reaching its decision. In paragraph 76 she said:

Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

- a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or
- b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or
- c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or
- d. has in the past acted dishonestly and/or is liable to act dishonestly in the future.

The panel was of the view that Mr Macphail's actions that led to his conviction engaged parts a, b and c of the Grant judgment in that he had potentially put patients at unwarranted risk of harm, brought the nursing profession into disrepute and breached fundamental tenets of the nursing profession.

The panel took account of the fact that Mr Macphail's actions did not amount to actual physical harm to the patients in his care. However, it had regard to the extreme and highly offensive nature of the material that led to his conviction and took the view that, his actions were liable to place his patients at unwarranted risk of harm. The panel considered that a nurse is always likely to come into contact with children, either as a patient or as the family member of a patient in their care.

The panel noted that Mr Macphail has not produced a reflective piece in relation to his actions and was of the view that he has not accepted the seriousness of them. The panel noted that Mr Macphail had applied for voluntary removal which indicated that he understood that his role as a Registered Nurse may no longer be tenable.

The panel had no indication that Mr Macphail has shown any remorse for his actions although it noted that he admits that his fitness to practise is currently impaired. Despite this, the panel was of the view that Mr Macphail's insight into his actions was lacking.

The panel was therefore of the view that there is a risk of repetition based on the repeated nature of the allegations along with Mr Macphail's lack of insight. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health, safety and well-being of the public and patients, as well as to uphold/protect the wider public interest, which includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards. The panel determined that, in this case, a finding of impairment on public interest grounds was required. Mr Macphail's actions were very serious and involved the distribution of indecent material involving children. The panel was of the view that Mr Macphail's actions, which resulted in his criminal conviction, required to be marked appropriately. It considered that a member of the public would be

appalled by such behaviour and it was necessary for the public interest to be marked by a finding of current impairment of fitness to practise.

The panel noted that, at one stage, Mr Macphail's view was that due to the current pandemic he should be able to return to practise. However, it considered that the current situation did not alter the clear public interest in making a finding of impairment of fitness to practise.

Having regard to all of the above, the panel was satisfied that Mr Macphail's fitness to practise is currently impaired.

Determination on sanction:

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike Mr Macphail off the register. The effect of this order is that the NMC register will show that Mr Macphail has been struck off the register.

In reaching this decision, the panel has had regard to all the evidence that has been adduced in this case. The panel accepted the advice of the legal assessor. The panel has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the Sanctions Guidance ("SG") published by the NMC. It recognised that the decision on sanction is a matter for the panel, exercising its own independent judgement.

The panel considered the following to be aggravating factors in the case:

- Mr Macphail's conviction involved distribution of the most extreme category of images of children;

- Mr Macphail has shown no remorse for his actions nor has he demonstrated either any insight or reflection;

The panel found no mitigating factors in the case but accepted that Mr Macphail had self-referred and had engaged with the NMC during this process.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the conviction. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the SG, which states that a caution order may be appropriate where 'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.' The panel considered that Mr Macphail's behaviour and subsequent conviction was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the seriousness of the conviction. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on Mr Macphail's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the SG. The panel is of the view that there are no practical or workable conditions that could be formulated, given the seriousness of this case. Further, his criminal conviction did not relate to his clinical practice.

Furthermore, the panel concluded that the placing of conditions on Mr Macphail's registration would not adequately address the seriousness of the conviction and would not protect the public or address the public interest in this case.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG indicates that a suspension order may be appropriate where (but not limited to) there is:

- a single instance of misconduct but where a lesser sanction is not sufficient
- no evidence of harmful deep-seated personality or attitudinal problems
- no evidence of repetition of behaviour since the incident
- the Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour

Mr Macphail's conviction, was a significant departure from the standards expected of a registered nurse and involved distribution of indecent images of children. The panel considered that Mr Macphail's actions which took place over a significant period of time amounted to a breach of a fundamental tenets of the profession and were fundamentally incompatible with him remaining on the register. Mr Macphail has shown no insight into the effect that his actions have had on the reputation of the nursing profession, the patients in his care or his colleagues.

The panel also had regard to the fact that Mr Macphail will remain subject to his community payback order for a further two years and is required to comply with the notification requirements of the Sexual Offenders Act (2003).

Balancing all of these factors, the panel has determined that a suspension order would not be an appropriate or proportionate sanction.

Finally, in looking at a striking-off order, the panel took note of the following from the SG:

- can public confidence in the professions and the NMC be maintained if the nurse or midwife is not removed from the register?
- is striking-off the only sanction which will be sufficient to protect the public interest?

- is the seriousness of the case incompatible with ongoing registration.

Mr Macphail's actions are significant departures from the standards expected of a registered nurse, and are fundamentally incompatible with him remaining on the register. The panel was of the view that Mr Macphail's conviction was very serious and to allow him to continue practising would undermine public confidence in the profession and in the NMC as its regulatory body.

Balancing all of these factors and after taking into account all the evidence before it, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the matters it identified, including the effect of Mr Macphail's actions in bringing the profession into disrepute by adversely affecting the public's view of how registered nurses should conduct themselves, the panel concluded that nothing short of this would be sufficient in this case.

The panel considered that this order was also necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

Determination on Interim Order

Pursuant to Article 29 (11) of the Nursing and Midwifery Order 2001, this panel's decision will not come into effect until after the 28 day appeal period, which commences from the date that notice of the striking off order has been served.

Article 31 of the Nursing and Midwifery Order 2001 outlines the criteria for the imposition of an interim order. The panel may only make an interim order if it is satisfied on one or more of three grounds; that it is necessary for the protection of the public, is otherwise in the public interest or in Mr Macphail's own interests. The panel may make an interim order for a maximum of 18 months.

The panel heard and accepted the advice of the legal assessor. It has also had regard to the NMC's guidance to panels in considering whether to make an interim order. The panel has taken into account the principle of proportionality, bearing in mind the balance it must strike between the interests of the public and those of Mr Macphail.

The panel has decided to impose an interim suspension order in this case. The panel is satisfied that such an order is necessary on the grounds of public protection and is otherwise in the public interest.

The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim suspension order. To do otherwise would be incompatible with its earlier findings.

In the circumstances the panel considered that an interim suspension order for a period of 18 months would be appropriate in order to cover the period of any possible appeal.

If no appeal is lodged then the interim suspension order will be replaced by the striking off order 28 days after Mr Macphail is sent the decision of this hearing in writing.

That concludes this determination.