Fitness to Practise Committee – 16 February 2011

Alternative mechanisms for resolving disputes

Executive summary and recommendations

Introduction

At its meeting in October 2010, the Fitness to Practise Committee received a literature review which reviewed the material that was available in the area of alternative dispute resolution. At that meeting, the Committee agreed that further exploration of the issue was appropriate in order to inform HPC's approach in this area.

As a result, the Executive has undertaken a review of the work plan that was previously considered by the Committee. A copy of that revised work plan is attached this paper as an appendix

The Committee will note that the work plan sets out a number of areas of work and items for consideration. A number of papers relating to that work is attached to this paper as appendices for the Committee to discuss.

Decision

The Committee is asked to discuss:

(a) the legal advice attached as appendix one
(b) the paper attached as appendix two analyzing appropriate cases;
(c) the paper attached as appendix three discussing the rationale and philosophy for mediation in HPC's regulatory regime; and
(d) the paper attached as appendix four setting out other relevant models.

The Committee is also asked to discuss and agree the following:

(e) that the Executive should proceed with the work set out in the work plan attached to this paper as appendix five;
(f) subject to that agreement, agree with the timescales set out in the work plan; and
(g) that further research should be commissioned as per the research brief attached at appendix six.

It is anticipated that the research commissioned will inform a potential future recommendation to Council about any further work or pilot that the HPC should consider undertaking.

Background information

The Committee considered a paper at its meeting in February 2010 which set our proposals for looking at alternative mechanisms for resolving disputes. That paper can be found at:

http://www.hpc-uk.org/assets/documents/10002C8A20100225FTP-11-alternativemechanismsfordisputes.pdf

The literature review undertaken by Charlie Irvine can be found at:

http://www.hpc-uk.org/assets/documents/1000315520101021FTP04-alternativemechanisms.pdf

The work stream 'Alternative mechanisms to resolve disputes' also includes the arrangements that HPC has put in place for:

- Discontinuance;
- Disposal of cases via Consent
- Learning Points when there is a no case to answer decision.

The Committee received a paper on the work undertaken by the Executive in relation to the Investigating Committee process and that paper can be found at http://www.hpc-uk.org/assets/documents/1000315F20101021FTP14-investigatingcommitteeupdate.pdf.

An updated version of the Practice note 'Disposal of case via Consent' is on the Committee agenda for this meeting. The Practice note 'Discontinuance' was approved by the Council at its meeting in December 2010 and can be found at http://www.hpc-uk.org/assets/documents/10002473PRACTICE_NOTE_ConsentOrders.pdf

The Committee will also be aware that the Health Professions Order 2001 provides that mediation may be an outcome of decisions by the Investigating Committee and by the Conduct and Competence and Health Committees. To date, there has not been an occasion when a case has been referred to mediation. With regards to the Investigating Committee, a case can only be referred to mediation once a case to answer decision has been reached. A panel of a final hearing can only refer a case to mediation if it finds that the allegation is well founded at a final hearing. Further detail on this can be found in the Practice note 'Mediation'.

Resource implications

To be considered as part of preparation for a potential pilot for a mediative approach

Financial implications

Commissioned Research – c.£25K

Stakeholder Event – c. £5K

The costs of any pilot will be considered as part of preparation for a potential pilot.

Appendices

Appendix One– Legal Advice
Appendix Two – Case Analysis
Appendix Three – The rationale for mediation and other mechanisms for resolving disputes in addition to the fitness to practise process
Appendix Four – Other relevant models of mediation
Appendix Five – Alternative Mechanisms to resolve disputes work plan
Appendix Six – Research Brief
Appendix Seven – Practice note ‘Mediation’

Date of paper

04 February 2011

Memorandum

To: Kelly Johnson, HPC

From: Jonathan Bracken

Date: 4th February 2011

Alternative Dispute Resolution

Kelly,

You asked me to consider the legal implications of the proposals set out in the literature review *Alternative Mechanisms for Resolving Disputes* conducted for the HPC by the University of Strathclyde.

In the conclusions to the literature review, the authors suggest that HPC consider the use of a mediatory approach at two stages:

- immediately after an allegation has been received, based on some form of 'sifting' process which ensures that mediation is only offered in cases where there is no potential risk to the public; and
- following investigation and after an allegation has been "upheld", in the form of a "restorative meeting" which would allow the registrant to acknowledge the harm caused, apologise, etc.

In both cases it is suggested that the outcome would need to be "endorsed by the investigating panel".

In terms of the HPC's legal powers, the first proposal would be a mechanism for dealing with cases which the HPC had decided did not raise fitness to practise (FTP) issues. As such, it would be an entirely new process and outside the scope of the HPC's statutory powers under the Health Professions Order 2001 (the Order). The second proposal is a variation on the mediation provisions contained in the Order and, as such, in with the scope of the HPC's existing powers and present less difficulties.

Diversion of cases

The first proposal is that, from the outset, some allegations could be diverted from the FTP process into some form of mediation.

The Order only provides the HPC with the power to deal with FTP allegations and not complaints more generally. In consequence, once a decision is made that an allegation does not raise any FTP issues (the practical effect of the proposed 'sifting' process), the HPC ceases to have any jurisdiction in relation to that allegation and becomes *functus officio*. Having discharged its statutory duty to consider whether an allegation raises any FTP issues and answered that question in the negative, it is prevented from taking further action by the limitations on its statutory powers.

Clearly, it would be possible for registrants and others to participate in some form of mediation process on a voluntary basis. However, as this would be beyond the HPC's statutory functions, it could not could not expend funds on such a process without the Order being amended to authorise that expenditure.

The Council does have the power, under paragraph 16 of Schedule 1 to the Order to "do anything which appears to it to be necessary or expedient for the purpose of, or in connection with, the performance of its functions" and that power may be relied upon in many instances to authorise discretionary expenditure. However, that power would be insufficient to authorise an entirely new process, especially as the Order currently limits the circumstances in which the HPC may provide or arrange mediation to cases where a finding has been made that there is an FTP 'case to answer' or that FTP is impaired.

In terms of structure and process, what is proposed is very similar to the Dental Complaints Services operated by the General Dental Council (GDC), where essentially 'consumer' disputes about pricing of dental care etc. can be diverted from the GDC's FTP process if the GDC is satisfied that the case does not raise wider FTP issues.

In order to enable that service to be established, the Dentists Act 1984 was amended in the following terms to authorise the GDC to incur expenditure for that purpose:

> **"Complaints**
>
> 2D.—(1) The Council may incur expenditure for the purposes of investigating and resolving dental complaints.
>
> (2) In this section "dental complaints" means complaints made by users of the services of registered dentists or the services of registered dental care professionals about—
>
> (a) the dental services provided by a registered dentist, a registered dental care professional or a body corporate carrying on the business of dentistry; or
>
> (b) the goods or materials provided to persons, or the facilities provided for persons, using those dental services.
>
> (3) The Council may also incur expenditure for the purposes of assisting the parties to the dental complaint in reaching a satisfactory resolution of that complaint."

This limitation on expenditure without statutory authorisation would only apply to the establishment and maintenance of a non-FTP mediation process. Examining how disputes between registrants and service users may be resolved is clearly part of the HPC's function of maintaining standards and the related objective of safeguarding the health and wellbeing of service users. Consequently, it would be within the HPC's powers to spend money on further research or conducting a voluntary mediation pilot project to see if there is value in, and demand for, such a process

Restorative Meetings

The literature review refers to restorative meetings being held after an allegation has been "upheld". It is not entirely clear whether this means after it has been determined that there is a 'case to answer' stage, but the reference to the "investigating panel" suggests that this is the intention.

Article 26(6) of the Order currently provides that, where the Investigating Committee concludes that there is a case to answer, one of the disposal options open to the committee is to "undertake mediation".

The Order makes no specific provision about the form of any mediation. Consequently, the term may be given its ordinary meaning and interpreted as encompassing a wide a range of processes which seek to assist the parties to a dispute or disagreement to reach a mutually satisfactory conclusion.

A restorative meeting of the kind envisaged would certainly fall within that definition and thus would be within the existing statutory powers of the Investigating Committee. Further, the use mediation is unaffected by any Practice Committee procedural rules and the procedure to be adopted is normally the subject of a written agreement between the parties and the mediator. Accordingly, the Council could give effect to this proposal by issuing a Practice Note supported by appropriate document templates.

Endorsement

The literature review suggests that, in respective both proposals, any mediated outcome would need to be "endorsed by the investigating panel".

Procedurally, this does not present any real difficulty. If the HPC operated a non-FTP mediation process, the Council could simply make the review of the outcomes from that process a non-statutory function of the Investigating Committee and, in practice, have those outcomes reported to and endorsed by Panels. In the case of restorative meetings, those would be conducted on behalf of the Investigating Committee in any event and, in effect, the outcome would be endorsed by that committee at the time it was reached.

However, it is important to note that Panels would not be able to interfere with the outcome (other than in exceptional circumstances) or to 'back track' on mediation.

In the case of non-FTP mediation, the sifting process should be sufficiently robust to rule out any FTP issues so that there are no residual public risks if a mediated solution cannot be found. In the case of restorative meetings, the decision to undertake mediation in a case where there is a 'case to answer' is a disposal decision which precludes any other disposal options available to the Investigating Committee under Article 26(6). In particular, the Investigating Committee cannot refer the case on for a full FTP hearing if mediation 'fails'.

As mediation is essentially a consensual process these are important safeguards, as otherwise registrants will enter mediation at a disadvantage and may feel compelled to accept an otherwise unacceptable mediated settlement for fear of the case being re-opened.

Conclusion

In summary, the first proposal in the literature review, of establishing some form of non-FTP mediation process, cannot be implemented fully without the HPC's legal powers being widened. However, the HPC could undertake further work on this proposal under its existing powers, including conducting a limited trial of such a process as a pilot project.

The second proposal in the literature review, of conducting "restorative meetings" after an affirmative case to answer decision has been made by the Investigating Committee, is a variation on that committee's power to undertake mediation and therefore could be introduced by means of a Practice Note and without any amendment to the Order or any rules made under it.

Endorsement of mediation decisions by the Investigating Committee would be lawful and feasible, but any system of endorsement needs to recognise the essentially consensual nature of mediation and not place any party at a disadvantage.

JKB

Alternative mechanisms to resolve disputes – case analysis

1. Introduction

1.1. As part of the project looking at alternative mechanisms to resolve disputes, a qualitative analysis of fitness to practise cases has been undertaken.

2. Background to case analysis

2.1. The case analysis was based on cases that were concluded during an 18 month period between July 2009 and December 2010. From early 2009, cases were categorised by the general nature of the allegation and this information was recorded on the fitness to practise database. A list of these categories is attached to this paper.

2.2. To ensure the best use of resources, those cases which did not contain information in this field (typically where the case had been opened before the introduction of the database field referred to) were excluded from the review.

2.3. A range of cases were removed from the sample where alternative dispute resolution (ADR) would clearly not be appropriate. For example cases where:

- there was a well founded decision at the final hearing;
- the allegations involved misconduct such as bullying and harassment in the work place, dishonesty and substance abuse;
- the issues raised were solely competency based; and
- the registrant was convicted or cautioned for an offence.

2.4. This is consistent with the Mediation practice note which sets out the types of cases where mediation is not appropriate. In general, these are cases which raise potential public protection issues and which cannot simply be regarded as a dispute between the registrant and the service user.

3. Concerns raised by members of the public

3.1. Cases where the concerns had been raised by a member of the public were by far the largest group remaining once the cases set out above had been removed from the sample (75%). This would be consistent with the general trend that cases from members of the public are less likely to meet the standard of acceptance for allegations or be found to have a case to answer, compared to cases from other complaint groups. The nature of the concerns raised in these cases are as follows:

- Abuse - verbal - patient;
- Breach of confidentiality;
- Failure to respect dignity of patient;
- Unsafe clinical practice;
- Failure to communicate - patient;
- Failure to obtain consent;
- Failure to provide adequate care;
- Failure to act in an emergency;
- Failure to conduct a full/accurate assessment;
- Failure to maintain adequate records;
- Failure to complete adequate/accurate report;
- Failure to report incidents; and
- Misuse/inappropriate use of patient information/personal details.

3.2. It is important to remember that in each of these cases either:
- the information provided did not meet the standard of acceptance to be considered as an allegation;
- a panel of the Investigating Committee found there was no case to answer; or
- the case was not well founded at a final hearing.

3.3. Clearly some of the allegations listed above, if found proved, would be serious. However, the fact that no action resulted from the case, may suggest that the matter could be addressed through an alternative process. For example, the patient/client may not understand the way in which decisions are made about what treatment or assistance they are entitled to, or whose responsibility it is to provide a particular service. This may result in them believing the registrant has failed to provide them with adequate care when in fact it the “system” that they have a complaint with rather than the individual concerned.

4. Concerns raised by employers

4.1. Cases where the concerns were raised by an employer, but were not excluded from the review as set out above, were far fewer in number than those from members of the public (10%). Again, this would be consistent with the overall trend that cases from employers are more likely to be referred from an Investigating Committee Panel to a full hearing. The small numbers make it more difficult to identify cases that would be appropriate for ADR or to determine that it would be appropriate for such cases.

4.2. The general nature of cases where there was found to be no case to answer, the case was not well founded or closed because it did not meet the standard of acceptance are as follows:

- Abuse - verbal – colleague;
- Failure to communicate - patient;
- Failure to collaborate with colleagues;
- Poor time management/organisational skills;

- Breach of confidentiality;
- Failure to respect dignity of patient;
- Failure to provide adequate care;
- Unsafe clinical practice;
- Failure to act in an emergency;
- Failure to complete adequate/accurate report;
- Failure to conduct a full/ accurate assessment;
- Failure to maintain adequate records; and
- Failure to report incidents.

4.3. An employer/employee relationship is different to that of a patient/client and a professional, and this may have a bearing on their willingness to engage in ADR. In some cases the employer is fully supportive of the Registrant and will already have put measures in place to remedy any issues or concerns. However, in other cases the Registrant may have left their employment by choice or having been through a disciplinary process.

4.4. As set out in the practice note, ADR *"will also be inappropriate in situations where there is a power imbalance which cannot be addressed, with the result that one* party *may dominate the outcome to the extent that the needs and interests of the other are not met."* This may be the case in some employer/employee situations.

5. Concerns raised by other registered professionals

5.1. A similar number of cases in the sample were brought to HPC's attention by another registered professional, as those raised by an employer above.

5.2. The issues are of a similar nature and the broad categories are listed below.

- Abuse - Verbal – colleague;
- Failure to communicate – patient;
- Failure to collaborate with Colleagues;
- Failure to obtain consent;
- Breach of confidentiality;
- Failure to respect dignity of patient;
- Failure to act in an emergency;
- Failure to provide adequate care;
- Failure to complete adequate/accurate report;
- Failure to maintain adequate records;
- Failure to conduct a full/ accurate assessment; and
- Unsafe clinical practice.

5.3. In cases where a colleague raised the concern, there may perhaps be more scope for using ADR than in those where the case was brought to our attention by the employer. This may particularly be the case where there are issues around communication, or perhaps a lack of

understanding about the role of another professional which may be the case in multi disciplinary teams for example.

6. Conclusions from case analysis

6.1. Any decision to proceed with ADR would have to be taken on a case by case basis. The categories of allegation used by the Fitness to Practise Department, in themselves, are not enough to determine whether a case may be suitable, and circumstances that gave rise to the case would have to be examined in detail. The categories used are broad and encompass a range of cases of differing severity.

6.2. There are, however, some common themes in the cases reviewed, particularly in relation to those cases raised by members of the public which was the largest complainant category. The broad themes would fit into those highlighted in the mediation practice note as being suitable for an alternative approach. The types of cases categories identified in the practice note are:

- cases that could be resolved with an apology;
- cases about complaints of overcharging or over-servicing;
- cases about management or contractual arrangements between;
- practitioners, where there is no evidence to suggest any impropriety; and
- cases involving poor communication.

Allegation categories

The following allegation categories are used within the fitness to practise database:

- Absence without Leave
- Abuse - Physical – colleague
- Abuse - Physical – patient
- Abuse - Sexual - adult other
- Abuse - Sexual - Adult patient
- Abuse - Sexual - child other
- Abuse - Sexual – colleague
- Abuse - Sexual - Child patient
- Abuse - Verbal – colleague
- Abuse - Verbal – Patient
- Assault
- Attending work under influence of drink
- Attending work under influence of drugs
- Breach of Confidentiality
- Bringing profession into disrepute
- Dishonesty - False claim to qualifications
- Dishonesty - Falsifying records
- Dishonesty – Fraud
- Dishonesty - Fraudulent entry to the register
- Dishonesty about previous employment
- Dishonesty - Sick Leave - false claims
- Driving under the influence of drink
- Driving under the influence of drugs
- Driving without Insurance
- Driving without license
- Failure to act in an emergency
- Failure to collaborate with Colleagues
- Failure to communicate – patient
- Failure to complete adequate/ accurate report
- Failure to conduct a full/ accurate assessment
- Failure to disclose previous convictions
- Failure to maintain adequate records
- Failure to obtain consent
- Failure to provide adequate care
- Failure to report incidents
- Failure to respect dignity of patient
- Failure to update practice
- Harassment/Bullying – colleague
- Harassment/Bullying – other
- Harassment/Bullying – patient
- Health – Alcohol
- Health – Depression

- Health – Drugs
- Health – Dyslexia
- Health – Mental
- Health – Physical
- Holding against their will
- Inappropriate relationship – Colleague
- Inappropriate relationship – patient
- Incorrect entry to the register
- Indecent Exposure
- Keeping equipment at home/ in car
- Manslaughter
- Misappropriation of drugs
- Misuse of employers information technology
- Misuse of employers information technology - Information technology- pornography (Adult)
- Misuse of employers information technology - Information technology- pornography (Child)
- Misuse/inappropriate use of patient information/personal details
- Murder
- Other drugs/Drink related Convictions
- Other drugs/Drink related Offences
- Other Motoring offence
- Plagiarism
- Poor time management/organisational skills
- Pornography (Adult) not in work place
- Pornography (Child) not in work place
- Publishing of article that was defamatory
- Serious Violence ABH, GBH
- Sleeping on duty
- Speeding
- Theft – colleagues
- Theft – Employers
- Theft – patient
- Unnecessary exposure to radiation
- Unsafe Clinical Practice
- Using Registration for Personal Gain

The rationale for mediation and other mechanisms for resolving disputes in addition to the fitness to practise process

1. Introduction

1.1 At its meeting on 21 October 2010, the Fitness to Practise Committee considered an externally commissioned literature review which looked at the use of Alternative Dispute Resolution (ADR) in the resolution of complaints or disputes between professionals and their clients. This included looking at approaches to mediation, conciliation and other mechanisms for resolving disputes.[1]

1.2 In the course of discussion, the Committee discussed whether a mediation process (or similar) would be 'a legitimate way of contributing to ensuring that [the] HPC met its main objective of safeguarding the health and well-being of persons using or needing the services of registrants'. It was acknowledged that a mediation approach would be 'a shift in how the HPC had conceived its public protection role to date'.[2]

1.3 This short paper looks at the potential rationale, on the basis of 'principle' or 'philosophy' for a mediation approach in addition to (or as part of, but not as a substitution for) the fitness to practise process.[3] In particular, whether such approaches would be consistent with the HPC's role as a regulator and its public protection remit.

1.4 It is acknowledged that the question of whether such approaches would achieve or add value to the HPC's public protection role (the 'why' question if you will) is to some extent linked to questions about the detail of the processes involved, including any legislative implications (the 'how' question). However, this is not the subject of this paper.

2. HPC and public protection

2.1 Article 3 (4) of the Health Professions Order sets out the HPC's main objective:

'…to safeguard the health and well-being of persons using or needing the services of registrants.'

[1] 'Alternative mechanisms for resolving disputes' – Fitness to Practise Committee, 21 October 2010
[2] Draft minutes for 21 October 2010 Fitness to Practise Committee meeting.
[3] This paper uses the term 'mediation' to refer to the broad range of possible approaches to resolving disputes between registrants and service users.

2.2 The Order establishes four key processes in which to deliver this objective, outlined below.

- Establishing standards for entry to the Register (and for continuing behaviour).
- Approving education and training programmes that meet those standards.
- Maintaining a Register of professionals that have successfully completed those programmes.
- Holding registrants to the standards – through fitness to practise and CPD standards and audits.

2.3 To date, the focus on public protection has been demonstrated through the following (for example, not intended to be exhaustive).

- A clear focus on 'threshold' – the minimum standards required for entry to the Register and for continuing registration. For example, standards of proficiency are focused on the threshold; standards of education and training on ensuring that threshold is delivered in education and training programmes.
- Clarity about the role of the regulator as opposed to the role of other organisations, in particular, the role of the professional bodies in supporting the development of the professions and in representing the interests of their members.
- Again, in the standards setting area, a clear differentiation between setting standards and how those standards are met, recognising that threshold standards may be exceeded and that other organisations with different objectives (service providers, for example) will have their own ways of working.

2.4 In discussion at the last meeting, there was an indication from the Committee that it was worth exploring whether some kind of mediation approach might represent a shift away from the objective of 'safeguarding' fitness to practise through judgements made against threshold standards and whether, therefore, such approaches might be in excess of, or inconsistent with, the HPC's public protection remit.

3. The potential value of mediation

3.1 The work looking at alternative mechanisms for resolving disputes was a direct result of the expectations of complainants research conducted by the HPC by IPSOS MORI. This research concluded that mediation or conciliation process should be considered 'prior to entry to formal fitness to practise proceedings' in light of public misunderstanding about the purpose of the HPC's processes and what they were designed to achieve.

3.2 Drawing on this research and other relevant literature, the literature review similarly highlighted how confusion between the HPC's fitness to practise role and more general complaints handling approaches might lead to tensions between the HPC's role and the expectations of those interacting with the process. This was illustrated by the example of a member of the public complaining, who expects that some action should taken in relation to their complaint. However, none may be required at a regulatory level, leading to dissatisfaction as the complainant feels that their complaint has not been taken seriously. This was contrasted to mediatory approaches involving face to face meetings, explanations and apologies which might increase satisfaction.

3.3 The literature review concluded that enhancing satisfaction (as described on the previous page) was one area in which mediatory approaches might have value, alongside resolving disputes without the need for formal investigation and supporting quality improvement.

3.4 The literature review further conceived the purpose of the fitness to practise process in a more holistic sense: balancing the need for procedural fairness; the needs of complainants and registrants; the need for preventing continuing harm to the public; and the need to encourage learning and improvement (at an individual and system / service level).

3.5 The potential goals of such approaches to the HPC are discussed further.

- **Diversion** – providing an alternative to formal investigating processes and the costs and resources involved.

- **Resolving disputes whilst maintaining relationships** – for example, by resolving disputes between practitioner and patient without ending the relationship. (It was noted at the last committee that mediation might assist in resolving complaints which are about a breakdown in communication between the registrant and service user.)

- **Settlement** – satisfying the interests of the parties involved by reaching a mutual agreement.

- **Learning** – mediation might assist in individuals, the HPC and the wider system in learning from complaints.

- **Customer satisfaction** – increased satisfaction through a process that might be able to accommodate a range of needs and expectations.

3.6 The literature review is by no means unequivocal about the appropriateness of these goals for the HPC as a professional regulator. For example, in relation to 'settlement' above, settlement may be inconsistent with the wider public interest. However, these goals do move us towards a different way of conceiving achievement of the HPC's public protection role.

4. A different way of achieving public protection?

4.1 The concepts of quality control and quality improvement have been used throughout the HPC's work to date looking at revalidation and might be helpful here. Figure 1 overleaf illustrates the distinction.

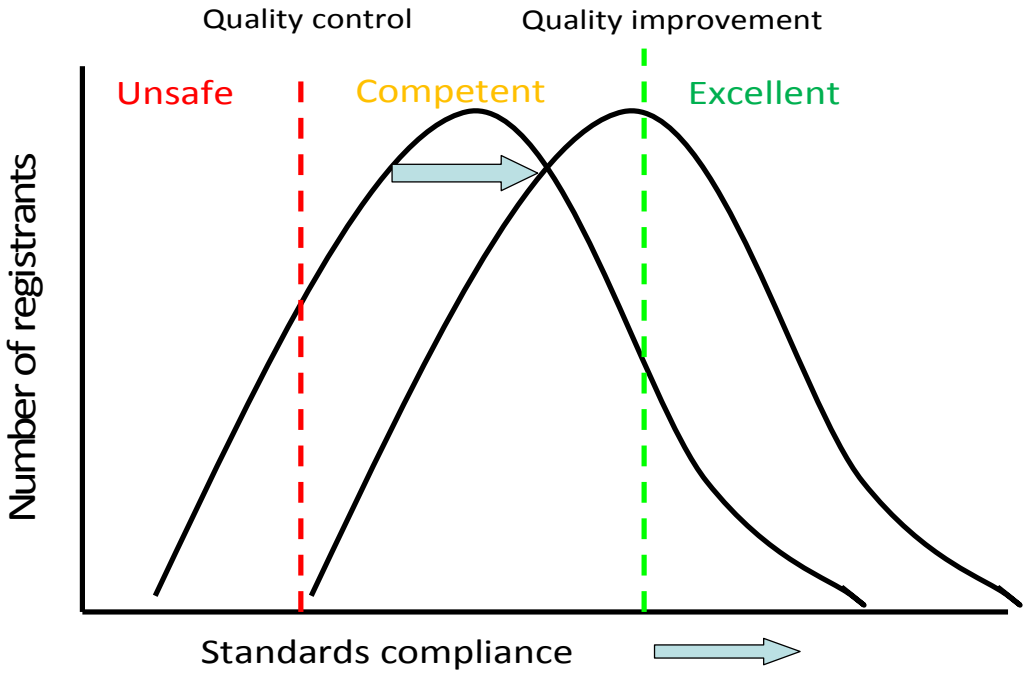

Figure 1

4.2 Quality control processes are aimed at ensuring compliance through threshold standards and arguably the focus therefore is on the minority of practitioners who fail to meet the necessary standards. The existing fitness to practise process can be cast in this light – picking up practitioners who have fallen below what is expected for registration and taking appropriate action to ensure ongoing compliance. In figure 1 this is shown as picking up unsafe practitioners and moving them to competent.

4.3 Quality improvement is aimed at improving the quality of the service delivered by practitioners at every level. In figure 1 this is shown as shifting the profile of practice at every level towards excellent.

4.4 Whilst this may at first seem like a dichotomy, these aims are not mutually exclusive and might be achieved simultaneously. The CPD standards and audits are a good example. They are a quality control mechanism because ongoing CPD is linked with continued registration and audits are undertaken to ensure compliance. They are a quality improvement mechanism because they are based on outcomes and benefits to others and are based on the widely accepted principle that registrants continue to learn and develop in order not only to maintain

their skills and knowledge but to develop (beyond the threshold entry point to a Register) as they progress through their careers.

4.5 In this light, a mediation approach might better meet (some of) the expectations of complainants (and therefore 'safeguard their health and wellbeing') as well as providing opportunities for registrants to learn and improve. Put another way, such an approach might help identify and remedy issues relevant to practice and registration at a stage where they do not raise issues of impairment, enabling learning which would prevent repetition, exacerbation and risk to the public at a later stage.

4.6 This approach would be shift from solely safeguarding the public by ensuring adherence to threshold standards, to an approach focused on meeting the needs of the public and improving the quality of registrants' practice, thereby improving the service user experience and public protection via a different route.

5. Summary

5.1 In summary, a mediation approach has the potential for the following benefits.

- For the complainant, such an approach might better fulfil expectations by helping to facilitate an explanation, understanding or apology. A focus on learning and improvement would demonstrate that the HPC was committed to improving practice and safeguarding the needs of service users.

- For the registrant, such an approach might be valuable by ensuring that registrants learn from mistakes or problems in their practice and improve their practice as a result

- For the HPC, such an approach might arguably be a different way of achieving its aim of safeguarding the health and wellbeing of those who use or need to use the services of registrants. In this regard, mediation might provide a mechanism for more timely and constructive resolution of some types of cases.

6. Decisions

6.1 This paper has sought to explain how mediation might fit within the HPC's wider philosophical approach to regulation, outlining how such approaches can be seen to be consistent with the aim of public protection and might have the potential to enhance regulation for the complaint, registrant and the regulator.

Other relevant models of mediation

1. Introduction

1.1 This short paper outlines two other relevant areas where mediation-type approaches have been used, which were not included as part of the literature review.

2. The Dental Complaints Service[1]

2.1 The Dental Complaints Service (DCS) is a department of the General Dental Council (GDC), but runs operationally at arms length. The DCS was launched in May 2006 and is funded and staffed by the GDC. The DCS considers complaints about services provided by private dental practices in the UK.

2.2 During the 12 month period to May 2009, the DCS handled 1870 complaints, bringing the total number since its launch to 5102. More than two thirds of complaints were resolved in less than a week and the average resolution time for all complaints was 13 days.

2.3 There is limited information available regarding the costs and finances of the DCS, however the GDC's 2009 business case allocates £2,944,299 to 'Associated Departments' which includes the Dental Complaints Service, Quality Assurance and Standards. This represents 11% of the GDC's total expenditure.

Complaint types

2.4 The DCS looks into complaints about services provided by private dental practices in the UK. The DCS expects patients to raise their complaint with the dental practice involved before approaching the DCS.

2.5 Examples of the types of complaints the DCS can look into include:

- receiving the wrong or poor treatment
- mistakes in diagnosis or treatment
- communication problems
- when it has not been clear how much the cost is
- significant mistakes over appointments
- a delay that could have been avoided
- faulty procedures, or failing to follow correct procedures

[1] Source: http://www.dentalcomplaints.org.uk/

- unfairness, bias or prejudice
- giving advice which is misleading or inadequate
- rudeness and not apologising for mistakes
- not putting things right when something has gone wrong

2.6 The DCS cannot look at complaints which are about NHS treatment.

2.7 For some cases, there may be another more appropriate organisation to deal with the complaint or it may only be resolved through the courts.

2.8 The DCS refers complaints to the GDC if it concerns the ability or behaviour of clinical staff which raise questions as to whether or not a professional should continue to practise.

Dental Complaints Service powers

2.9 The DCS works with both parties to try and resolve the problem. If the practice is unable to resolve the problem in the first instance, the DCS will try to help the patient and dental professional come to a resolution.

2.10 If an agreement cannot be reached, both parties can put their concerns before a local complaints panel, which will recommend how to resolve the complaint. The DCS does not have any formal powers to enforce their recommendations, although they expect that they will almost always be followed.

2.11 The panel recommendations can include asking the dental professional to:

- explain or say sorry for what happened;
- explain that there is no complaint to answer;
- refund fees or a portion of them; and/or
- fund treatment that helps put things right.

2.12 The DCS can also recommend that the dental practice changes the way it works so that similar problems do not happen again; and that lessons are learnt from things that have gone wrong.

2.13 For complaints where there was an outcome, 57.8% refunded fees (totalling £106,811), 28.02% explained the treatment or cost, 7.97% contributed towards remedial treatment, and 6.43% apologised.

2.14 Only eight complaints panels were held and the GDC attributes this low number to the willingness of dental professionals to work with the DCS to resolve problems.

Discussion

2.15 The Committee previously considered the DCS approach in the context of the regulation of Hearing aid dispensers from April 2009. This was discussed given that hearing aid dispensers work exclusively in the private sector and as such complaints sometimes concern consumer issues, such as the price of hearing aids.

2.16 The Committee concluded at that time that it was not necessary to consider the HPC establishing a similar system, given that this would not be applicable to a lot of complaints and to a lot of registrants who work in the NHS and in other managed environments.

2.17 In light of the literature review, however, we might make the following observations:

- The DCS only considers cases only where there is no overriding public protection / public safety interest. There is therefore a clear division between fitness to practise proceedings and matters which can be resolved in this way.

- Only private dental treatment is covered. In the NHS patients can complaint via the NHS complaints system and then, if dissatisfied, to the Parliamentary and Health Service Ombudsman.

- The focus is issues such as poor treatment, the cost of treatment and communication issues.

- The approach is facilitative in nature, with trained staff working to try and reach agreement between both parties.

- The outcomes include an explanation and an apology.

- There is a focus on learning from complaints and quality improvement.

3. Mediation / conciliation processes in psychotherapy and counselling

3.1 In the course of the HPC's work looking at how psychotherapists and counsellors might be regulated in the future, the HPC has heard about the use of mediation in the field to resolve disagreements between practitioners and clients and heard arguments that there are some disputes between therapist and client that may be more amenable to more informal means of resolution.

3.2 The Executive has undertaken some initial desk research to look at the different approaches adopted by professional organisations / bodies in this field (where mediation is used). Where information is available, there appear to be a variety of different approaches. These approaches include:

- Mediation as an informal approach that could be considered on a receipt of a complaint or at subsequent stages in a complaint procedure.
- Mediation used, but only in relation to complaints where it is judged that there is unlikely to be fitness to practise issue that would require other action.
- Facilitation used to help clarify the nature of the complaint.
- Mediation 'strongly encouraged' as the first step for all complainants, with unsuccessful resolution leading to further investigation; successful resolution leads to case being closed.
- Use of face to face meetings with a mediator (normally someone independent) or with members of complaints committees (who may be professionals) who undertake the mediation / conciliation / facilitation process.

3.3 This information highlights an issue for the Committee to consider in any pilot arrangements – the kind of cases that are and are not suitable for mediation and the role it should or should not play within the context of the existing process.

Alternative Mechanisms to Resolve Disputes

Introduction

This paper sets out the work plan for the further work to be undertaken by the Fitness to Practise Department and Policy and Standards Department in this area. All of the work is designed to provide material and provoke discussion around the appropriateness of mediation within HPC's regulatory structures.

Activity	Description	When	Person responsible
Monograph Research	As with other similar reports, Charlie Irvine's report will be turned into an HPC Monograph and published accordingly	February 2011	Publications Manager
Case Analysis	A report setting out more detail on the kinds of cases which may be appropriate to deal with using a mediative approach.	February 2011	Head of Case Management
Legal Advice	The solicitor to Council will be asked to provide legal advice on whether any legislative changes are required for HPC to proceed in this area and the governance arrangements for this piece of work	February 2011	Director of Fitness to Practise
Rationale/Philosophy	A paper providing further information the rationale for using mediation techniques and how this fits with HPC's wider philosophical approach to regulation	February 2011	Director of Policy and Standards
Other relevant models	A paper setting out other relevant models in this area	February 2011	Director of Policy and Standards
Commissioned Research	Qualitative research to ask the views of registrant's and	April 2011	Director of Fitness to Practise

	complainants about the role of mediation in HPC's regulatory process. It is suggested that this research follows a similar approach to that previously commissioned on the expectations of HPC's fitness to practise process. It is anticipated that this will include: - registrant focus groups; - stakeholder interviews; - interviews with registrants (in appropriate cases) who were subject to cases which were not well founded or where a no case to answer decision was reached; and - interviews with complainants where the allegation was not well founded , no further action was taken and where there was no case to answer It is anticipated that this research will help inform the approach that HPC take in this area		
Mediation in HPC's regulatory regime	A report analysing the advantages and disadvantages of the use of mediative	June 2011	Director of Fitness to Practise

	techniques at distinct phases of HPC's regulatory proceedings. Those phases are as follows: (a) When a case does not meet the standard of acceptance as it does not relate to the fitness to practise of a registrant; (b) Where no case to answer is reached (this is potentially an extension of the learning points model that is currently in place; and (c) Where the allegation is not well founded at final hearing		
Case Manager survey	This will ask HPC case managers of their views as to where mediation might be helpful	June 2011	Director of Fitness to Practise
Other complaints processes	Care must be taken not to divert cases through a mediative process when there may be other organisations that are better placed to assist.	June 2011	Director of Policy and Standards
Pilot	Subject to the agreement of the Committee, Council and any necessary legislative changes and financial and resource requirements, it is anticipated that a pilot will be undertaken in quarter 3 of 2012/13.	October 2012	Director of Fitness to Practise

Alternative Mechanisms to resolve disputes

Project brief

To undertake research into the views of registrants, complainants and other stakeholders on mediation and its potential contribution to the Health Professions Council's (HPC's) regulatory role. This work will inform the approach that HPC takes towards mediation, as well as adding to the evidence base of professional health and social care regulation more widely.

This document

This brief outlines the overall aims of the project and is designed to provide some of the background information required for the initial proposal. It is envisaged that a more detailed meeting will be required with representatives from the HPC to address the more specific details of the objectives and research.

About the HPC

The Health Professions Council is an independent regulator of health professionals set up to protect the public. To do this, we set and maintain standards which cover education and training, behaviour, professional skills and health, maintain a register of health professions who meet these standards, approve and monitor UK educational programmes which lead to registration and take action if a registrant's fitness to practise falls below our standards.

We have been in existence since April 2002 and now regulate 15 professions (c.213,000 registrants), including physiotherapists, chiropodists / podiatrists and practitioner psychologists. It is anticipated that the number of professions that the HPC regulates will increase in the coming years to include social workers in England and a wider range of healthcare science professions.

The HPC is funded entirely from fees payable by the professionals it regulates. We have an annual income of approximately £16m of which £7.2m is spent on the operations of the fitness to practise function.

Organisational Structure

The HPC is governed by the Council which consists of 20 members made up of 10 registrants and 10 lay members. The Council is supported in its work by the statutory and non-statutory committees and the executive officers employed by the organisation.

The organisation is divided into nine departments: Fitness to Practise; Operations including Registrations; Education; Policy and Standards; Communications; Finance; Information Technology; Human Resources; Secretariat; and Chief Executive.

Background to the research

We consider allegations about health professionals on our Register via our 'fitness to practise' process. Allegations are received from a wide range of sources, including the public, employers and other registered health professionals. Cases vary considerably in terms of the seriousness of the allegation. If a case is referred to a hearing and found proven, we can take a range of actions to protect the public which, in the most serious of cases, can include removing a health professional from the Register so that they can no longer practise.

In 2009/2010, 0.38% of registrants were subject to an allegation. In the same period, 31% of allegations were received from members of the public. However, of those allegations, only 22% were referred to a final hearing. This compares to 80% of the allegations made by employers which were referred to a hearing in the same period.

The purpose of our fitness to practise process is to consider whether a registrant's fitness to practise is impaired (negatively affected in some way) and therefore whether we need to take any action to protect members of the public. The types of cases we can consider include misconduct; lack of competence; and convictions / cautions.

This means that the fitness to practise process is very different from other types of complaints process. The process is not designed, for example, to provide complaints with an explanation, an apology or compensation. It is also not designed to 'punish' a registrant for a mistake (i.e. a mistake may have been made but this might be not be sufficiently serious to impair that registrant's fitness to practise

In 2009, we commissioned Ipsos MORI to undertake a qualitative study with stakeholders looking at their expectations of the fitness to practise complaints process. The study included depth interviews with registrants, complainants and employers who had made complaints. The research found that members of the public complain for a variety of reasons and that the purpose and limitations of the fitness to practise process was not always well understood. One of the recommendations of this research was that the HPC should: 'Investigate opportunities… to provide a mediation and conciliation process, prior to complaints entering the formal fitness to practise process.'

Our existing legislation allows us to refer a case to mediation but only where we have decided that a case should be referred to a hearing or where a case has been proven at a final hearing. As such, we have not to date had a case where a panel has decided that it would be appropriate to refer a case to mediation.

At its meeting on 25 February 2010, the Fitness to Practise Committee approved a work plan looking at alternative mechanisms for resolving disputes. This included commissioning a literature review to review the material available in this area. The literature review was undertaken by Charlie Irvine and colleagues at the University of Strathclyde Law School The review identified some of the benefits of ADR in other contexts and outlined the components of good practice

Scope of research

The research would seek to address the question of whether ADR has the potential to enhance the regulation regime delivered by HPC, from the perspective of the complainant, the professional, and the regulator.

It is envisaged that this research will be primarily qualitative in nature. It would include focus group discussions (comprising of registrants and members of the public) to seek feedback from individuals on the potential benefits and disadvantages of mediatory tools. Interviews would be undertaken with those who have made complaints or have been subject to an allegation which was not well founded or where no case to answer decision was reached to discover more about their views on the potential role of mediation in HPC's regulatory processes. It also anticipated that interviews with stakeholders selected from employers and professional bodies will be included in the methodology. .

The results of the research would assist the HPC in determining whether and where alternative dispute resolution has a place in HPC's processes. For instance, should mediation be offered in cases

- which are not about fitness to practise;
- which have not been referred to a final hearing;
- where a decision that the registrant's fitness to practise is not impaired has been reached.

A detailed report outlining the findings is required.

Next steps

Proposals for this work should be submitted in writing to the Director of Fitness to Practise no later than [ ]

The proposal document should detail the research approach and must include detailed timings and a breakdown of cost. We would anticipate a budget of circa £[ ]

The overall deadline for the delivery of the research would be [ ] with a draft report available comment prior to this date (by a deadline to be determined with the successful organisation/individual]

Further information

Contact Kelly Johnson, Director of Fitness to Practise on 0207 840 9754 or kelly.johnson@hpc-uk.org or view our website www.hpc-uk.org

References

Gulland J (2007) Scoping report for the HPC on existing research on complaints mechanisms http://www.hpc-uk.org/assets/documents/100021EB230408-enclosure4-Complaintsreview.pdf

Irvine C, Robertson, R, Clark, B (2010) Literature review – Alternative mechanisms to resolve disputes http://www.hpc-uk.org/assets/documents/1000315520101021FTP04-alternativemechanisms.pdf

IPSOS Mori (2010) Expectations of the Fitness to Practise Complaints process http://www.hpc-uk.org/assets/documents/10002C8520100225FTP-06-expectationsofcomplainants.pdf

Practice note 'Mediation' http://www.hpc-uk.org/assets/documents/10001DDCPRACTICE_NOTE_Mediation.pdf

PRACTICE NOTE

Mediation

This Practice Note has been issued by the Council for the guidance of Practice Committee Panels and to assist those appearing before them.

Introduction

The Health Professions Order 2001[1] provides that, in relation to a fitness to practise allegation, if:

- an Investigating Committee Panel concludes that there is a case to answer, it may undertake mediation instead of referring the allegation to another Practice Committee;[2]

- a Panel of the Conduct and Competence Committee or Health Committee finds that the allegation is well founded, it may undertake mediation if it satisfied that it does not need to impose any further sanction on the registrant.[3]

The HPC, like other statutory regulators, exists to protect the public. In considering the use of mediation - which is essentially a means of resolving private disputes - care must be taken to ensure that HPC always acts, and is seen to act, in the public interest and avoids creating any confusion about its role as a regulator.

In cases involving conflict between a registrant and a service user, the latter may prefer not to take matters further and be satisfied to resolve matters by mediation. However, if the complaint involves matters which HPC needs to pursue further in the public interest then it has an obligation to do so, even if the complainant would prefer that it did not do so.

If mediation is to be used by HPC, it should be on the basis of:

- clear, fair and transparent processes;
- criteria which are consistently applied and prevent its overuse;
- maintaining confidentiality during the mediation processes but enabling the outcome to be reported to the relevant Practice Committee.

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[1] SI 2002/254

[2] Article 26(6)

[3] Article 29(4)

As mediation is essentially a consensual process, any decision to mediate will fail unless it is supported by both the registrant concerned and the other party.

Clearly, there can be no guarantee that mediation will always achieve a mutually acceptable resolution and therefore, before determining that mediation may be appropriate, the Panel must be satisfied that, irrespective of the outcome of the mediation, it does not need to take any further steps to protect the public.

The Health Professions Order 2001 only provides for mediation to be used after a decision has been made that there is a case to answer or where it is determined that an allegation is well founded. As both of those decisions are a matter of public record, in order to provide transparency and accountability, the fact that an allegation was resolved by means of mediation will form part of the information which HPC makes available to the public.

Although mediation is typically assumed to involve an unresolved dispute between a registrant and a complainant, there is no reason why, in appropriate circumstances, the registrant and the HPC cannot be the parties in a mediation.

A draft Order referring an allegation to mediation is set out in the annex to this Practice Note.

What is mediation?

Mediation is a decision-making process in which the parties, with the assistance of a neutral and independent mediator, meet to identify the disputed issues, develop options, consider alternatives and attempt to reach a mutually acceptable outcome. It involves use of a common-sense approach which:

- gives the parties an opportunity to step back and think about how they could put the situation right; and
- enables participants to come up with their own practical solution which will benefit all sides.

Mediation is a collaborative problem-solving process which focuses on the future and places emphasis on rebuilding relationships rather than apportioning blame for what has happened in the past. It also makes use of the belief that acknowledging feelings as well as facts allows participants to release their anger or upset and move forward.

Mediation is a voluntary process. The participants choose to attend, making a free and informed choice to enter and if preferred, leave the process. If the process and the outcome is to be fair, all parties must have the willingness and capacity to negotiate and there must be a balance of power between the parties.

What is the role of the mediator?

The mediator acts in an advisory role in regard to the content of the dispute and may advise on the process of resolution but has no power to impose a decision on the parties.

Mediators do not advise those in dispute, but help them to communicate with one another. The role of the mediator is to be impartial and help the parties identify their needs, clarify issues, explore solutions and negotiate their own agreement.

How is mediation conducted?

Typically, the mediator will meet each party separately and ask them to explain how they see the current situation, how they would like it to be in the future and what suggestions they have for resolving the disagreement. If both parties agree to meet, the following steps then take place:

- the mediator will explain the structure of the meeting and ask the parties to agree to some basic rules, such as listening without interrupting;
- each party will then have a chance to talk about the problem as it affects them. The mediator will try to make sure that each party understands what the other party has said, and allow them to respond;
- the mediator will then help both parties identify the issues that need to be resolved. Sometimes this leads to solutions that no one had thought of before, helping the parties to reach an agreement;
- the agreement is then recorded and signed by both parties and the mediator.

In practice, mediation is not undertaken by the Panel itself but by a trained mediator appointed to act on its behalf. The HPC has standing arrangements for the appointment of mediators at the request of Panels.

Referral criteria

Panels need to recognise that certain disputes should never be referred to mediation. As mediation is a closed and confidential process, its use in cases where there are issues of wider public interest – such as serious misconduct, criminal acts, serious or persistent lapses in competence, or abuse or manipulation of service users – where its use would fail to provide necessary public safeguards and seriously undermine confidence in the regulatory process.

Mediation will also be inappropriate in situations where there is a power imbalance which cannot be addressed, with the result that one party may dominate the outcome to the extent that the needs and interests of the other are not met.

Suitable cases

Mediation may (but will not always) be appropriate in minor cases that have not resulted in harm, which are not indicative of more serious or continuing concerns about a registrant's fitness to practice and, for example:

- involve low levels of impairment where the Panel feels that no sanction needs to be imposed;
- could be resolved with an apology, but where the Panel is satisfied that any failure to apologise is not indicative of lack of insight or other deep seated concerns;
- are about complaints of overcharging or over-servicing but where there is no evidence to suggest fraud or any other form of abuse of the professional relationship;
- are about management or contractual arrangements between practitioners, where there is no evidence to suggest any impropriety;
- involve poor communication, but which is insufficient to suggest that any service user has been put at risk or compromised.

Unsuitable Cases

Mediation is not appropriate in cases which raise potential public protection issues and which cannot simply be regarded as a dispute between the registrant and the service user. This includes (but is not limited to) cases involving:

- serious misconduct;
- abuse of trust; boundary violations, predatory or manipulative behaviour;
- serious or persistent lapses in professional competence;
- criminal acts, dishonesty or fraud;
- serious concerns arising from the health of the registrant;
- substance abuse;
- where the registrant has frequently been the subject of allegations; or
- where mediation would be impossible because the registrant is recalcitrant or the complainant does not want to face the registrant again.

October 2009

Health Professions Council

[PRACTICE] COMMITTEE

ORDER OF REFERRAL TO MEDIATION

The decision of the Committee in respect of the allegation made on [date] against [name of registrant] is that [there is a case to answer in respect of the allegation] [the allegation is well founded] for the following reasons:

[set out reasons]

Having considered all of the options open to it the Committee is satisfied, for the following reasons, that it would not be appropriate to [refer this matter to the Conduct and Competence Committee or the Health Committee] [take any further action]:

[set out reasons]

The following matter(s) remains unresolved between [name of registrant] and [name of other party]:

[set out matter(s)]

and they have consented to that matter being referred to mediation by the Committee and have further agreed:

- to attend the mediation;
- to inform each other and the mediator in writing, before mediation commences, of what they regard as the issues to be mediated;
- to file sufficient documents or other material with the mediator to enable mediation to be conducted effectively; and
- that the mediator may inform the Committee of the outcome of the mediation.

THE COMMITTEE ORDERS that:

1. the matter set out above be referred to mediation;

2. the mediation be conducted on its behalf by [name of mediator or description of how the mediator is to be appointed];

3. the mediator inform the Committee of the outcome of the mediation.

Signed: _____ Panel Chair

Date: _____