

Fitness to Practise Committee, 26 May 2011

Alternative Mechanisms to Resolve Disputes

Executive summary and recommendations

Introduction

At the last meeting of the Committee, a work plan relating to the work stream 'Alternative Mechanisms to Resolve Disputes' was approved by the Committee. Part of that work plan included a paper looking at the use of alternative dispute resolution in HPC's regulatory regime. That paper is attached as an appendix

Decision

The Committee is asked to discuss the paper attached as appendix one looking at the use of alternative dispute resolution in HPC's regulatory regime. The Committee's decision may inform subsequent paper and decisions but no specific decision is required at this stage.

Background information

The paper considered by the Committee at its meeting in February 2011 can be found at <http://www.hpc-uk.org/assets/documents/1000333120110216FTP05-alternativemechanismsfordisputes.pdf>

Resource implications

None

Financial implications

None

Appendices

Appendix One – Alternative Dispute Resolution in HPC's Regulatory Regime

Date of paper

16 May 2011

The Use of Alternative Mechanisms to Resolve Disputes in HPC's Regulatory Regime

1 Introduction

- 1.1 At its meeting in February 2011 the Fitness to Practise Committee considered a work-plan on alternative mechanisms to resolve disputes. Part of that work-plan included a paper to look further at the use of alternative mechanisms to resolve disputes in HPC's regulatory regime. The Committee will recall that the initial brief for this piece of work was to look broadly at alternative ways for resolving disputes, including, but not limited to the use of mediation. Its aim was to explore whether such arrangements have a place in HPC's regulatory regime and whether there are other steps as part of the fitness to practise process that the HPC could take in order to help 'resolve' issues and concerns about registrants.

2 Definition

- 2.1 Alternative Dispute Resolution describes '*alternatives to the formal, state sponsored adjudication system*'¹. In the HPC context, it can be more simply described as an alternative and proportionate mechanism to the formal adversarial hearings used to deal with allegations regarding the fitness to practise of registrants.
- 2.2 As articulated in the Irvine report '*although most mediation can be described as settlement-orientated, another school, known as 'transformative mediation' insists that the process should focus on the relationship between the parties, Here the mediator's role is to 'support' party interaction, restoring to those in conflict a degree of competence or 'empowerment', which in turn leads to a greater capacity to recognise the perspective of the other. This approach has been controversial within the mediation community. It may, however, have much to offer in the HPC context, where 'settlement' is not the main aim and where(sic) supporting direct communication may be the most important benefit of mediation.*'²

3 HPC's approach to justice

- 3.1 At its meeting in March 2010, the Council considered a paper discussing the HPC's approach to justice and the promotion of public protection. A copy of that paper can be found here:

¹ Irvine, C, Robertson, R, Clark, B. (2011) *HPC Research Report: Alternative Mechanisms for resolving disputes: a literature review* p6

² Ibid, p11

<http://www.hpc-uk.org/assets/documents/10002CF020100325Council-enc09-approachestojustice.pdf>.

The paper particularly commented that

'The approach that the HPC takes to its fitness to practise process is designed to balance public protection with the rights of the registrant. The Council has worked hard to ensure that, so far as possible, the principles of its fitness to practise processes sit at the rehabilitative/restorative end of the justice continuum. One of the many definitions of restorative justice is one which describes it as 'problem solving approach' to crime or conflict.'

- 3.2 The meaning of HPC's fitness to practise processes was further articulated by the Council through a policy statement in July 2010. A copy that statement can be found at: http://www.hpc-uk.org/assets/documents/10002FD8FTP_What_does_it_mean.pdf

It states that

'When we say someone is 'fit to practise' we mean that they have the skills, knowledge and character to practise their profession safely and effectively. However, fitness to practise is not just about professional performance. It also includes acts by a registrant which may have an impact on public protection or confidence in the profession or in the regulatory process. This may include matters not directly related to professional practice.

Fitness to practise proceedings are about protecting the public. They are not a general complaints resolution process. They are not designed to resolve disputes between registrants and service users.'

- 3.3 The purpose of HPC's fitness to practise process is not to provide resolution to a complaint in the sense that complaint resolution processes are often understood, but rather make a decision as to whether a registrant is 'fit to practise'.
- 3.4 However, it is important to reiterate in the context of this paper, HPC's wider objective. Article 3(4) of the Health Professions Order 2001 (the Order), provides that

'the main objective of the Council in exercising its functions shall be to safeguard the health and well-being of persons using or needing the services of registrants.'

4 HPC's current use of alternative mechanisms to resolve disputes

- 4.1 A number initiatives have been implemented to develop and improve upon the way in which we handle fitness to practise allegations. These can be

described as alternative and proportionate mechanisms to resolve disputes. More detail about such initiatives is outlined below.

4.2 Mediation

4.2.1 There is already an existing provision for the use of mediation in HPC's existing legislative framework. Article 26(6) and Article 29(4) of the Order respectively provide 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*
- *a Panel of the Conduct and Competence Committee or Health Committee finds that the allegation is well founded, it may undertake mediation if it is satisfied that it does not need to impose any further sanction on the registrant.*

4.2.2 The use of mediation has proved challenging, in part because of where it sits within HPC's regulatory framework. 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 mediation, it does not need to take any further steps to protect the public.

4.2.3 The Practice note 'Mediation' provides more guidance to panels on the use of mediation in HPC's existing regulatory framework.

4.3 The Standard of Acceptance for Allegations

4.3.1 Article 22(5) of the Order requires allegations against registrants to be received 'in the form required by Council'. The Practice note 'Standard of Acceptance for Allegations' sets out in more detail what that 'form' is, but also provides more detail about contexts in which the HPC is unlikely to take a matter forward. These include:

- **Anonymous complaints** – the Practice note provides that 'Generally, the HPC will not take action in respect of anonymous allegation. In this context, 'anonymous' means either an allegation made by a person whose identity is unknown to the HPC or an allegation made by a person who has asked the HPC not to disclose his or her identity. It is extremely difficult to operate a fair and transparent process if the complainant is unknown or refuses to be identified.'
- **Complaints against registrants acting as expert witnesses** – in dealing with complaints made against registrants who are acting or have acted as an expert witnesses in other proceedings, the HPC must be careful not to interfere in matters within the jurisdiction of that other body.
- **Consumer complaints and business disputes** – where the substance of a complaint involves consumer related issues or a business dispute, and there is no evidence of misconduct or a risk to public protection, it is unlikely that the matter will satisfy the final

element of the standard of acceptance, that the allegation relates to fitness to practise

- **Minor employment issues** – In most cases, complaints involving minor employment issues which do not compromise the safety or well-being of service users should not be considered as fitness to practise allegations
- **Internet social networks** – The Practice note sets out the issues that should be taken into account when dealing with complaints about use (or misuse) of internet social networks.
- **Motoring offences** – The Practice note provides more detail on the type of motoring and drink – driving offences which meet the standard of acceptance.

4.3.2 In considering whether to take any action against a registrant, the HPC must have regard to the concept of impairment as it is interpreted and applied by Practice Committee Panels. It would be inconsistent with the obligation set out in Article 3(4) of the Order for the HPC to pursue allegations which, to a reasonable degree of certainty, it knows Panel will not regard as amounting to impairment.

4.3.3 When in receipt of a concern about a registrant, an assessment is made as to whether the matter meets the standard of acceptance and whether any further information is required. If the case does not meet the standard (after receipt of further information or otherwise), the complainant will be advised and in appropriate circumstances, signposted to alternative sources of guidance or support. The Fitness to Practise team have operating guidance on “Signposting” and the guidance recently published by the Council of Healthcare Regulatory Excellence (CHRE) on how the public can make a complaint about the health care they have received will be used to supplement this.

4.4 Learning Points

4.4.1 In 2010-11 the Fitness to Practise department undertook a piece of work to explore the use of “learning points” by panels of the Investigating Committee. A process was subsequently developed to provide for this and has been in use since September 2010. Where appropriate, panels considering cases at Investigating Committee stage can now include learning points in their decision where they find that there is no case to answer. Learning points are only appropriate for use where there is a realistic prospect of proving the facts and the statutory ground of the allegation but not impairment. If there is a realistic prospect of proving impairment, that case has to be referred to a final hearing panel.

4.4.2 Clear guidance and training has also been provided to panels setting out when it might be appropriate to include learning points in a decision. The guidance includes the following points:

- The panel should include learning points in their decision where they are satisfied that;

- a realistic prospect of proving the statutory ground exists; and
 - there are matters which need to be brought to the attention of the registrant but which fall short of establishing that the registrant's fitness to practise is impaired.
- If the panel is considering providing guidance on a range of issues then the panel should reflect whether the need for such broad guidance suggests that their decision on impairment may be incorrect.
 - The comments made should be limited and must only be guidance. They cannot take the form of conditions of practice or any other mandatory requirement.

4.5 Disposal of case via consent

4.5.1 The Practice note 'Disposal of Cases by Consent' provides guidance on the process by which HPC will consider disposing of a case via consent. This process was approved by Committee in late 2008 with the processes implemented the following year. The Practice note provides that '*Disposing cases by consent is an effective case management tool which reduces the time taken to deal with allegations and the number of contested hearings which need to be held.*' The consent process is a means by which the HPC and the registrant concerned may seek to conclude a case without the need for a contested hearing.

4.5.2 HPC will only consider resolving a case by consent:

- after an Investigating Committee Panel has found that there is a "case to answer", so that a proper assessment has been made of the nature, extent and viability of the allegation;
- where the registrant is willing to admit the allegation in full. A registrant's insight into, and willingness to address failings are key elements in the fitness to practise process and it would be inappropriate to dispose of a case by consent where the registrant denies liability; and
- where any remedial action agreed by the registrant and the HPC is consistent with the expected outcome if the case was to proceed to a contest hearing.

4.5.3 The consent process is also used when existing conditions of practice or suspension orders are reviewed. This enables orders to be varied, replaced or revoked without the need for a contested hearing.

4.5.4 The arrangements that the Council has put in place with respect to disposing of a case via consent include the fact that a Panel has to agree to the arrangement. The Panel therefore has the option to reject a proposal for disposing of a case via consent and HPC is obliged to make it clear to registrants that co-operation and participation in the consent process will not automatically lead to a Consent Order being approved.

4.5.5 The Consent arrangements are not a “plea bargaining” exercise by which registrants can accept parts but not the entire allegation nor is it a mechanism by which a public hearing can be avoided. Consideration also has to be given as to whether it would be in the wider public interest to hold a hearing.

4.5.7 In any event, as part of the consent process, an agreed statement of facts (including the allegation), is placed on the website setting out ‘if the Registrant seeks to return to the HPC Register at any time the application would be treated as if the registrant had been struck off as a result of that allegation.’

4.6 Discontinuance

4.6.1 In December 2010, the Council approved a Practice note on the topic of ‘Discontinuance’. This Practice note provides more guidance to panels and those appearing before them as to how panels should address their obligations as set out in **Ruscillo v CHRE and GMC**. **Ruscillo** provides that in conducting fitness to practise proceedings, panels:

‘should play a more proactive role than a judge presiding over a Criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.’

4.6.2 The discontinuance approach adopted by the Council provides a process by which all or part of proceedings can be halted without need for a substantive fitness to practise hearing. As with the consent process, discontinuance is not a mechanism to avoid a hearing which would be otherwise necessary but is used on the occasions where

‘after the Investigating Committee has determined that there is ‘case to answer’ in respect of an allegation, objective appraisal of the detailed evidence which has been gathered since that decision was made may reveal it is insufficient to sustain a realistic prospect of proving the whole or part of the allegation.’

4.6.3 The decision to grant a discontinuance application rests with a panel of the Conduct and Competence or Health Committee rather than with members of the Executive. If a discontinuance application is granted on the whole of the allegation, the decision is provided to CHRE to consider in accordance with section 29 of the National Health Service Reform and Health Professions Act 2002.

5 Use of Mediation

5.1 One of the challenges for professional regulators when considering the use of alternative dispute resolution and in particular mediation, has been the sense that using such processes is a move away from public adjudication of a three way issue (registrant, complainant and the regulator representing the wider public interest) to private settlement of a two way issue (disagreement between the registrant and complainant).

Two considerations may contribute to resolving that difficulty. Those considerations are:

- identifying cases where the use of ADR is appropriate because any wider public interest is, at best, de minimis; and
- the concept of the regulator being the 'other party' in ADR, in other words, using ADR to address minor cases of impairment.

5.2 In the case analysis considered by the Committee at its meeting in February 2011, a range of cases were identified which may have been better resolved using alternative dispute resolution. Those categories of cases are:

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

6 HPC's Current use of Mediation

6.1 Standard of Acceptance/No Case to Answer

6.1.1 In HPC's current legislative framework, the option of referring a case for mediation is not available when a case does not meet the standard of acceptance or where there is no case to answer. This phase is perhaps the most obvious place where a mediative approach could work. The biggest area of dissatisfaction for complainants with the fitness to practise process is when a case does not meet the standard of acceptance or when a no case to answer decision is made. The reasons for this can include a misunderstanding about the purpose of the fitness to practise process but it does create a belief that the complaint has not been taken seriously and dissatisfaction with the process and with HPC's model of regulation.

6.2 Case to Answer

6.2.1 The use of mediation is already provided for at this phase in HPC's regulatory proceedings.

6.2.2 As is commented at 4.2.2, the use of mediation in HPC's existing regulatory framework has proved difficult given that, in deciding to refer a case to mediation, the Panel must be satisfied that, irrespective of the outcome of mediation, it does not need to take any further steps to protect the public.

6.2.3 Any pilot that is developed should therefore include mechanisms to account for this concern.

6.3 Final hearing

6.3.1 The Practice note 'Finding Fitness to Practise is Impaired' sets out what panels must take into account in determining whether a registrant's fitness to practise is impaired. It provides that '*Panels must take account of a range of issues which, in essence, comprise of two components:*

1. the 'personal' component: the current competence, behaviour etc. of the individual registrant; and
2. the 'public' component: the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence.

6.3.2 It is with having to consider the 'public' component and the wider public interest that the use of mediation in HPC's existing framework has been challenging. Further exploration of the concept of the regulator being the 'other party' in ADR should go some way to addressing this .

6.3.4 There are clear examples of cases which should not be resolved using a mediative approach or alternative mechanisms to resolve disputes. It is not appropriate in cases which raise potential public protection issues and which cannot simply be regarded as dispute between the registrant and service user.

6.3.5 Other considerations that would need to be taken into account in expanding on the use of mediation at this stage in HPC's regulatory proceedings are any suggestion that justice has been administered behind closed doors. Mediation by its very nature takes place in private; nevertheless, in the HPC context the decision to refer a case for mediation would be a public decision. Furthermore, given the consent of both parties is necessary for mediation to succeed, care would also have to be given to ensure that agreement to proceed to mediation was not on the basis of a fear of a more severe sanction.

7 Conclusions and Recommendations

7.1 It is clear that HPC already has a range of processes in place which can be described as alternative and proportionate mechanisms to resolve disputes. Further work is currently being undertaken in the form of commissioned research on attitudes towards mediation and the development of a potential pilot.

7.2 It is of course important to ensure that HPC does not deal with matters where there are other organisations or recourses to deal with those issues. In using mediation to deal with fitness to practise cases, care needs to be taken not to invent a new jurisdiction to deal with cases that would otherwise be closed. Further, informed consent from all parties (registrant, Regulator and complainant) is essential in ensuring the success of any alternative dispute resolution initiative. Nevertheless, it is arguable that HPC does have a clear role to play in the area of alternative dispute resolution which will help to continue to ensure that we continue to meet our objectives under Article 3(4) of the Order.

7.3 Any potential pilot model would only add to the evidence base of regulation. It would also be the decision as to whether further work in this area will help to ensure that HPC continues to meet its obligations as set out in Article 3(4) of the Order.