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# PRACTICE NOTE

## Mediation

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

### Introduction

The Health Professions Order 2001<sup>1</sup> 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;<sup>2</sup>
- 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.<sup>3</sup>

The HPC, like other statutory regulators, exists to protect the public. In using 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 practitioner 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.

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.

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<sup>1</sup> SI 2002/254

<sup>2</sup> Article 26(6)

<sup>3</sup> Article 29(4)

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 it does not need to take any further steps to protect the public, irrespective of the outcome of the mediation.

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. 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. Mediators do not advise those in dispute, but help them to communicate with one another.

## **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. 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.

**April 2009**

DRAFT - FOR APPROVAL

# 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: \_\_\_\_\_