

Council, 11 February 2016

## Mediation Pilot

### Introduction

In October 2011 the Council decided that a mediation pilot should be undertaken to determine the use and value of such a process to complainants, registrants and contributing to ensuring public protection. The pilot was to consist of six cases or last a period of six months.

Following this decision, work was undertaken to develop the pilot and it began in September 2013. The pilot was designed to include cases where there has either been a case to answer or no case to answer decision made by a panel of the Investigating Committee. Although the pilot was set up to only take place for a limited period of time and involve a limited number of cases, the process needed to be thorough in order to test its feasibility and value for the longer term. To date one case has been through the mediation process successfully.

In light of the length of time the pilot has been in operation, the Council is asked to confirm whether it should be continued. The attached paper provides an update on the pilot to date.

### Decision

The Council is asked to:

- i). consider the attached paper; and
- ii). decide whether mediation pilot should be continued.

### Background information

The pilot was approved by the Council in October 2011. Prior to this the following pieces of work were undertaken:

- 2009 - Jackie Gulland was commissioned to undertake a *Scoping Report on Existing Complaints Mechanisms*
- 2010 - Ipsos MORI undertook research on behalf of the HPC into the *Expectations of the Fitness to Practise Complaints Process*
- 2011- Charlie Irvine was commissioned to undertake research into *Alternative Mechanisms for resolving disputes: a literature review*
- 2011 - Stakeholder event was held to share the research to date and engage interested parties and hear their views

**Resource implications**

The cases are identified and managed through the existing FTP processes and existing resources.

**Financial implications**

Budget has been allocated for the pilot as part of the annual budget process to cover the costs of the mediator, the venue and expenses. The approximate cost per mediation is £2500.

**Appendices**

Mediation Pilot Update

**Date of paper**

25 January 2016

**Resource implications**

Accounted for in the 2014-15 Fitness to Practise Directorate Budget

**Financial implications**

Accounted for in the 2014-15 Fitness to Practise Directorate Budget

**Appendices**

Appendix One: Practice Note: Restoration to the Register

**Date of paper**

19 November 2015

## **Mediation Pilot Update**

### **1. Overview and background**

Between 2009 and 2011 research was undertaken by Jackie Gulland, Charlie Irvine and Ipsos MORI as part of a work stream looking at Alternative Mechanisms to Resolve Disputes. In October 2011 the Council decided that a mediation pilot should be undertaken to determine the use and value of such a process to complainants, registrants and contributing to ensuring public protection.

Although there is provision within the Health and Social Work Professions Order 2001 (the Order) to refer a case to mediation, the circumstances in which this can be done are limited. A case can only be referred where a case to answer decision is made by a panel of the Investigating Committee, or where an allegation is well founded at a final hearing. There is no provision for the case to be returned to the FTP process should mediation fail.

The legal advice obtained advised that we could undertake a limited trial such as a pilot, but that fully implementing a mediation scheme for non-FTP cases (such as where a no case to answer decision has been made) would require HCPC's legal powers to be widened.

The pilot has been designed to offer mediation in appropriate cases where either a case to answer or no case to answer decision is made by a panel of the Investigation Committee. Where a case to answer decision is made, the Committee include in its decision an order that the case should be referred back if mediation fails.

The previous Council and Fitness to Practise Committee papers relating to this can be found here:

**February 2011 FTP Committee paper -**

[www.hpc-uk.org/assets/documents/1000333120110216FTP05-alternativemechanismsfordisputes.pdf](http://www.hpc-uk.org/assets/documents/1000333120110216FTP05-alternativemechanismsfordisputes.pdf)

**October 2011 Council paper –**

[www.hpc-uk.org/assets/documents/10003738Enclosure04-alternativemechanismstoresolvedisputes.pdf](http://www.hpc-uk.org/assets/documents/10003738Enclosure04-alternativemechanismstoresolvedisputes.pdf)

**February 2013 FTP Committee paper -**

[www.hcpc-uk.org/assets/documents/10003EC7enc10-mediationpilotupdate.pdf](http://www.hcpc-uk.org/assets/documents/10003EC7enc10-mediationpilotupdate.pdf)

### **2. How does mediation fit with HCPC's regulatory functions?**

All cases are investigated prior to a decision being taken that mediation may be suitable. Examining how disputes between registrants and service users may be resolved is part of the HCPC's function of maintaining standards and the related objective of safeguarding the health and wellbeing of service users.

Mediation is one alternative approach that can be taken to resolve cases and avoid a contested hearing, whilst still ensuring the public is adequately protected.

### **2.1. Benefits of mediation**

There are number of benefits which mediation may bring in HCPC FTP cases:

- In cases where there is no case to answer, the mediation process may provide a mechanism for dealing with outstanding, often longstanding issues which were not sufficient to require referral to a hearing but nonetheless remain to be resolved.
- In cases where a case to answer has been found, mediation may provide an alternative to the case being considered at a contested hearing.
- It may provide an opportunity for the registrant to gain insight and learning into the complaint that was made, what led to it and whether there are things they could change or improve and thus prevent further fitness to practise investigations in future.
- It may provide an opportunity for other organisations and registrants to learn from the complaint and what gave rise to it.
- It may provide an opportunity for the complainant to gain an insight and understanding of the situation from another perspective. This may reduce or allay their concerns.
- Mediation may be able to satisfy the interests of all parties in reaching a mutual agreement as opposed to having a decision imposed on them by a panel.
- It can provide higher levels of satisfaction to those involved in the process and a sense of ownership and responsibility. This can have a positive effect on working relationships.

### **3. Pilot preparation**

In advance of the pilot, criteria for the cases suitable for referral to mediation was developed. The criteria is broad to ensure that cases are not ruled out without proper consideration. This aims to ensure that cases are not excluded unnecessarily, which can be a common issue in mediation schemes. Under the pilot, cases can be referred to mediation where either a case to answer or no case to answer decision has been made by the Investigating Committee.

Guidance and training was provided to panels and operating guidance is available to the Fitness to Practise Team setting out how cases should be identified and managed.

Information was developed for registrants and complainants to inform them about mediation where cases are identified as being suitable. This guidance was approved by the Plain English Campaign to ensure it is easily understood and accessible. In order to proceed to mediation both parties must agree.

The TCM Group was appointed to provide mediation services for the pilot and training was provided to their mediators on the HCPC FTP process and the context of the pilot.

The pilot commenced in September 2013.

#### 4. Cases identified as suitable for mediation

In total, 9 of cases have been identified as suitable for mediation and mediation offered to the parties. In 8 of the cases identified, the Investigating Committee had made a no case to answer decision and in 1 case had made a case to answer decision. Of these cases:

- the registrant agreed to mediation in 3 cases;
- of those 3 cases, the complainant agree to mediation in 2 cases;
- one case has been through the mediation process; and
- in one case both parties agreed, however, once a date had been arranged for the mediation to take place, the complainant withdrew.

It should be noted that in general, the registrant is offered the opportunity of mediation in the first instance, if they agree the complaint is then contacted.

The table below provides the detail of the cases.

| Profession                    | ICP decision      | Allegation summary   | Registrant Agreed | Complainant Agreed | Outcome                                       |
|-------------------------------|-------------------|--|-------------------|--------------------|---|
| Social Worker                 | No case to answer | Concerns relate to the quality and accuracy of an assessment   | Yes               | Yes                | Written agreement reached between the parties |
| Chiropodist                   | No case to answer | Registrant placed staple in the wrong place in patient's foot. Registrant didn't advise patient of error           | N/A               | No                 | N/A   |
| Speech and Language Therapist | No case to answer | Concerns relate to the registrant making inappropriate comments and inappropriately making a diagnosis for a child | No                | N/A                | N/A   |
| Chiropodist                   | No case to answer | Registrant cut the patients toenails too short and disregarded the patients request to stop removing dead skin     | Yes               | No                 | N/A   |
| Social Worker                 | Case to answer    | Concerns relate to the production of a report and lack of personal contact   | Yes               | Yes                | Complaint later withdrew                      |

|                           |                   |   |    |     |     |
|---------------------------|-------------------|---|----|-----|-----|
| Chiropodist               | No case to answer | Concerns relate to the registrant not completely diagnosing the patients foot condition   | No | N/A | N/A |
| Practitioner Psychologist | No case to answer | Concerns relate to an inaccurate report, which the complainant claimed that the registrant did not amend in a timely manner                       | No | N/A | N/A |
| Chiropodist               | No case to answer | Concerns relate to the registrant not obtaining appropriate consent and causing harm to their toe   |    |     |     |
| Social Worker             | No case to answer | Concerns relate to the registrant misrepresenting a conversation had with the complainant and taking a letter without the complainants permission | No | N/A | N/A |

#### 4.1. Case review

In late 2018<sup>5</sup> a review was undertaken of 36 cases considered by panels of the Investigating Committee which were not initially referred to mediation, to ensure that all appropriate cases are being identified. A total of three cases were identified during the review that had not been identified previously. It was found that the decisions which had learning points attached to them generally were cases suitable for mediation. From this exercise it was noted that the current criteria for identifying mediation cases is appropriate, however, if the scheme were to continue, it may be useful to build a regular review into the process to provide an additional check to ensure all potentially suitable cases are identified.

#### 5. Feedback

In order to improve and evaluate the pilot, feedback has been sought from all those who have been offered mediation, including where mediation has been refused.

##### 5.1. Mediation refused

Feedback forms were completed by three individuals who declined mediation and both parties who went through the process. Information was also gathered from the remaining individuals through the content of their correspondence explaining their

reasons for not wanting to participate. The feedback was broadly positive in respect to the information provided by the HCPC.

A summary of the comments are as follows:

- Three individuals who completed the feedback forms considered the information provided by the HCPC informative and easy to understand.
- One complainant felt nothing would be achieved from a meeting and would have preferred a personal invitation for mediation from the registrant.
- One complainant commented that mediation would not alleviate the pain suffered due to the treatment they received from the registrant.
- One registrant's representative responded that there was no benefit from meeting with the complainant as there are two differing accounts. The registrant believed there are no outstanding issues which could be resolved.
- One registrant commented that they were not prepared to waste time talking further to the complainant when there is no case to answer.
- One registrant believed that mediation should have been offered before the ICP stage, and believes mediation would send mixed messages to the complainant where there is a no case to answer decision. The registrant was convinced that complainant will not be happy with the response. The registrant also no longer works for the Trust so thinks it is unnecessary.
- A registrant did not find the information provided on the phone helpful and refused to participate on advice from a Union.
- A registrant had already met with the complainant on several occasions to discuss the outcome of the assessment and the reasons for this. The registrant felt all the complainant's questions had been answered and had nothing further to add.

## **5.2. Mediation undertaken**

In the case that proceeded through the full process, the feedback was very positive. Both parties agreed that the process was well managed and dealt with in a timely manner. The mediator was considered to have had a good understanding of the issues in dispute, facilitated the session well and was considered impartial. Both parties would recommend the mediation process to others and overall rated their experience as 'very good' and 'excellent'.

The mediator was also asked to provide feedback and very positively rated the quality of the information provided and the parties' understanding of the process based on the information they had been provided by the HCPC.

The mediation lasted 6 hours in total and consisted of individual meetings with the mediator and a joint meeting. The settlement that was reached was agreed between the parties to be confidential and so the HCPC is not privy to the detail. The overall comments from the mediator were that it seemed to be of great benefit to each party.

## **6. Evaluation and continuation of the pilot**

In order to determine the success or otherwise of the pilot, or what changes / adaptations may need to be made should the process be implemented on a permanent basis, the pilot will need to be evaluated. The areas identified as key to feeding into this evaluation are:



- The cost associated with mediation;
- The length of time cases take to proceed through the mediation process compared to other cases;
- The questions and queries raised by those offered mediation to assess the quality of the information provided by HCPC to the parties;
- Feedback from the parties who refuse mediation;
- Feedback from the parties and mediators where mediation is undertaken; and
- The outcomes in cases where mediation is successful.

As only one case has proceeded to mediation there is very limited information to evaluate in a number of these areas. Given the limited number of cases that have been identified to date, and that only one case has been mediated, it would be beneficial to continue the pilot further in order to gather more information to undertake a full evaluation.

This would not require any additional work with regard to the process and documentation as this is already in place. No additional costs are associated with continuing the pilot unless further cases are referred to mediation, and this has been provisionally included in the 2016-17 FTP budget.

Legal advice relating to the continuation of the pilot has been received from Special Counsel (which is attached) and states:

*'In my opinion it would certainly be within the powers of the Council to continue the pilot project, but it is a decision which would need to be put to and formally agreed by the Council. In particular, they would need to be satisfied that the inability to find suitable cases or participants to date was not a meaningful conclusion to the existing project.'*

The experience of other organisations indicates that it can take a long period of time for mediation to be adopted and accepted and for enough cases to be considered that there is a body of knowledge to evaluate and the scheme and embed it into the process. During the setup of the pilot, discussions with Charlie Irvine and Scottish Legal Complaints Commission (SLCC) in particular, highlighted this risk. There is often not a big take up for mediation unless it is made a compulsory part of a process, however for those who do undertake mediation the feedback is positive. The SLCC report around 95% of respondents rate the overall mediation as either excellent or very good.

Should the Council approve the continuation of the pilot, the feedback provided to date can be used to review the information provided to registrant's and complaints and to communicate the purpose and benefits of mediation to representative bodies.

**Eve Seall**

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**From:** BRACKEN Jonathan <jonathanbracken@bdb-law.co.uk>  
**Sent:** 02 December 2015 16:37  
**To:** Eve Seall  
**Subject:** Continuation of mediation pilot

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Eve,

As you know, in essence my advice to the Council on the mediation pilot was that:

- (1) the HCPC has no express *vires* for conducting mediation outside of the arrangements set out in the Health and Social Work Professions Order 2001; but
- (2) the HCPC is entitled to conduct limited pilot projects or similar exercises for evidence-gathering purposes if it considers that it may wish to seek legislative change but lacks the evidence base to argue for change.

On the basis of that advice, in 2011 the Council approved a limited mediation pilot project, in order to assist it to make an informed decision as to whether to pursue mediation as an ADR method.

That decision was taken over four years ago and the limited work conducted to date is far from conclusive (unless of course the lack of cases is taken to be a conclusion in and of itself).

In my opinion it would certainly be within the powers of the Council to continue the pilot project, but it is a decision which would need to be put to and formally agreed by the Council. In particular, they would need to be satisfied that the inability to find suitable cases or participants to date was not a meaningful conclusion to the existing project.

Kind regards,

JB

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