

Fitness to Practise Committee, 25 February 2010

Alternative mechanisms for resolving disputes

Executive summary and recommendations

Introduction

The attached paper sets out a piece of work for 2010/2011 looking at alternative mechanisms for resolving disputes.

Decision

The Committee is invited to discuss and approve the approach outlined in the attached paper.

Background information

- This piece of work is described in the paper 'Expectations of complainants' being considered at this meeting of the Committee.
- The role of alternative dispute resolution in the fitness to practise processes of professional regulators was discussed by the Council at its October 2009 away day.
<http://www.hpc-uk.org/assets/documents/10002C53enclosure11-Councilworkshops.pdf>

Resource implications

- Commissioning literature review
- Organising and attending stakeholder event
- Researching and writing Committee papers

These implications are included in the Policy and Standards Department / Fitness to Practise Department workplans for 2010/2011. There may be other resource implications dependent upon the outcomes of this work.

Financial implications

- Cost of literature review
- Stakeholder event including cost of venue and other associated costs

These implications are included in the Policy and Standards Department budget for 2010/2011.

Appendices

None

Date of paper

15 February 2010

Alternative mechanisms for resolving disputes

1. Introduction

1.1 This paper outlines a project to be jointly carried out by the Policy and Standards and Fitness to Practise Departments in 2010/2011 looking at alternative mechanisms for resolving disputes.

1.2 This piece of work will look broadly at alternative ways of resolving disputes or complaints between registrants and the public, including, but not limited to, exploring processes for mediation and alternative dispute resolution or 'ADR'. This work will explore whether such arrangements have a place in the Fitness to Practise process or whether there are other steps that the HPC could take in order to help 'resolve' issues and concerns about registrants which fall short of impairment of fitness to practise.

1.3 This work links to a number of other pieces of work being undertaken by the Fitness to Practise Department. In particular it links to the recently published commissioned research undertaken by IPSOS Mori looking at the expectations of complainants when making complaints as part of the Fitness to Practise process.

1.4 This paper discusses some of the background to this work (sections 2 to 5) and then goes on to outline the planned project including timescales for delivery.

2. Council away day

2.1 At its away day in 2010, the Council discussed the question 'Does alternative dispute resolution have a role if the fitness to practise processes of a professional regulator?'. In its discussion the Council considered whether processes such as mediation and alternative dispute resolution (ADR) had, in principle, a role to play in the fitness to practise processes of professional regulators and also discussed some of the logistical issues that might need to be resolved if such an approach was adopted.

2.2 The overall conclusion from the Council's discussion was that more work was necessary in order for the Council to be properly informed on this topic. A number of questions, issues and areas for further exploration were identified including:

- The need for further exploration of how mediation and ADR might work for a professional regulator, including the need to benefit from the experience of other regulators and organisations involved in mediation and ADR.
- The need to consider what issues dispute resolution or mediation might resolve, the benefits to those involved and the potential impact such arrangements might have upon the HPC. One of the potential benefits identified in the discussion was fulfilling the expectations of complainants by providing a way of resolving issues or concerns which whilst important to the complainant, do not relate to impairment of fitness to practise.

- The need to keep in mind the difference between the purpose of a fitness to practise process (i.e. in deciding whether a registrant's fitness to practise is impaired and therefore whether any action is necessary to protect the public) and a complaints resolution process (i.e. an explanation and apology; compensation; changes to policies and procedures).

3. Mediation

3.1 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.

3.2 Article 26 (6) (a) provides that if an Investigating Committee concludes that there is a case to answer, it may undertake mediation instead of referring the allegation to one of the practice committees for a hearing.

3.3 Article 29 (4) (a) provides that if a panel of the Conduct and Competence or Health Committees finds that an allegation is well founded it may undertake mediation if it is satisfied that that it does not need to impose any sanction on the registrant.

3.4 To date, there has not been an occasion when a panel of the Investigating, Conduct and Competence or Health Committees has referred a case to mediation. With regards to the investigating committee, it can only refer a case to mediation once a case to answer decision has been made. In order to each a case to answer decision, a panel has to reach the conclusion that there is a 'realistic prospect', based on the information before it, that, if considered at a hearing, the registrant's fitness to practise would be found impaired. A panel hearing a case can only refer to mediation if it finds that an allegation is well founded (i.e. that the registrant's fitness to practise is impaired).

3.5 As such, these panels have not, to date, considered it appropriate to refer those cases to mediation. There therefore remains the question about whether, if mediation was available at the pre case to answer or finding of impairment stage, this might provide an alternative method of resolving a complaint which might better meet the expectations of the complainant.

4. Expectations of complainants

4.1 The Fitness to Practise Department commissioned IPSOS Mori to look at the expectations of those making complaints to the HPC about registrants. The overall aim of the research was to determine the expectations of complainants in terms of: the role of the regulator; initial expectations; case handling; and the outcome of cases.

4.2 One of the recommendations made as part of this research is that the HPC might consider whether there may be circumstances in which 'conciliation' processes might better fulfil the expectations of complainants raising concerns about registrants.

4.3 The fitness to practise process is not about punishing the registrant for a mistake or about making an apology to the complainant. As such there are cases where perhaps there has been a break down in communication between a registrant and a patient or family member or where there has been a minor error or failing by the registrant, but a panel concludes there is no case to answer in relation to impairment of fitness to practise. The outcome of this research suggests that we need to consider ways in which we might better fulfil the expectations of complainants as part of the fitness to practise process.

5. Fitness to practise policies

5.1 There have been a number of changes to practice notes and other fitness to practise policies and procedures which are also relevant to this work. These developments have been aimed at improving the fitness to practise process by improving processes and improving the accessibility of the process for complaints. A number of other pieces of work are also planned which might usefully feed into this strand of work.

5.2 This work has included or includes:

- The standard of acceptance for allegations (to be considered at this meeting of the Committee) has been revised to include information about 'consumer complaints and business disputes' which do not give rise to impairment of fitness to practise. The Council meeting in March 2010 will consider a paper looking further at defining the concepts of fitness to practise and impairment which will further help in making clear at a strategic, policy level the purpose of the fitness to practise process.
- The development of signposting guidance for Fitness to Practise Case Managers so that complainants can be signposted to other sources of help and advice where their complaint or concern does not fall within the HPC's remit.
- Ongoing reviews of no case to answer and not well founded decisions. This will help to identify any learning which might be derived from cases which are not referred to a practice committee or which are not well founded at final hearing.

5.3 The title for this work is 'alternative mechanisms for resolving disputes' in recognition that mediation and ADR are only two mechanisms and that there may be other approaches the HPC could adopt which might meet the expectations of complainants by satisfactorily resolving complaints.

5.4 For example, some of the other regulators have legislation which allows a system of 'recorded concerns' to be adopted by which a panel might determine that there is no case to answer but nonetheless decide that an issue had been identified for which it was necessary to warn the registrant as to their future conduct. As part of this work the HPC might consider whether it might be useful for panels to provide 'learning points' where a no case to answer or not well founded decision is reached and this might have the potential to better meet the needs of complainants and could be commensurate with the HPC's public protection role by helping to prevent recurrence of problems. The review of not

well founded and no case to answer decisions will be helpful in considering the merits of this approach as one way 'alternative' way of resolving disputes.

6. Workplan

6.1 The overall aim of this work is to explore alternative mechanisms for resolving disputes in order to allow the Committee and the Council to reach an informed decision about any enhancements to the existing fitness to practise process.

6.2 This work will be delivered in the following stages:

- An externally commissioned literature review of the material available in this area. This will include exploring any evaluations of the benefits and usefulness of the mediation, ADR and conciliation processes adopted by other organisations. This stage of the work aims to meet the conclusion reached at the Council away day – that we need to learn from other regulators and organisations that have approaches in this area.

The Executive will put together a project brief to invite expressions of interest from researchers and provide this as a paper to note at a future Committee meeting.

- A stakeholder engagement event is planned for September 2010. This event is planned to build upon the discussion of the Council at its away day in October 2009 by holding an event to engage with a wider group of stakeholders across the professional regulatory field, which might include professional bodies; patient and consumer advocacy groups; and other regulators, both professional and service related, in healthcare and elsewhere. The event would be discursive and deliberative in nature with the aim of seeking the wider views of the professional and regulatory field on the principle of mediation, ADR and other ways of resolving disputes, as well as debating the challenges of implementing such approaches.

The event might include the outcomes of the literature review and presentations from the HPC on the fitness to practise process and the outcome of the research about the expectations of complainants, as well as presentations from other organisations with experience of dealing with and resolving complaints from the public. A report will be written summarising and analysing the outcomes of the event.

- The Policy and Standards Department and Fitness to Practise Department will work together to carry out ongoing reviews of no case to answer and not well founded decisions. This will assist in identifying those cases where an alternative method of resolving complaints might be helpful. For example, it might help identify whether panels might identify learning points from no case to answer cases.
- Following the delivery of points 1 to 3 and above, the Executive will consider the outcomes of the project and put together a discussion paper for the Committee looking at the various options and recommending the next steps.

7. Timetable

The following is an outline timetable for this piece of work.

Activity	Timescale	Role(s) responsible
Produce project brief for external commissioned research; tender for research.	March 2010	Director of Policy and Standards with Director of Fitness to Practise
Send out project brief to interested parties seeking expressions of interest	By May 2010	Director of Policy and Standards
Review of no case to answer and not well founded decisions	Ongoing (with 6 month report at November / December 2010 Committee meeting)	Policy and Standards and Fitness to Practise Departments
Receipt of literature review	By August 2010	Director of Policy and Standards
Stakeholder engagement event	Late September 2010	Director of Policy and Standards and Director of Fitness to Practise
Discussion paper to Fitness to Practise Committee	November / December 2010	Director of Policy and Standards and Director of Fitness to Practise
Additional papers / policy development as may be required	TBC	TBC