Council 20 October 2011

Alternative Mechanisms to Resolve Disputes

Executive summary and recommendations

Introduction
In October 2011, the IPSOS Mori Mediation Research commissioned by the HPC was published. The attached report sets out how the Executive proposes to progress with that work.

Decision
The Council is asked to discuss this report and agree that the Executive should proceed with taking forward recommendations 1 and 2 of the Ipsos recommendations through a voluntary mediation project to determine the use and value of such a process to complainants, registrants and contributing to ensuring public protection.

Background information
Provided for in the Paper

Resource implications
To be accounted for in the 2012-13 budget

Financial implications
To be accounted for in the 2012-13 budget

Appendices
Appendix One Alternative Mechanisms for resolving disputes
Appendix Two Alternative mechanisms for resolving disputes: a literature review
Appendix Three Ipsos MORI Mediation Research
Appendix Four *Rethinking what we're trying to achieve,* Tribunals, Spring 2011

Date of paper
10 October 2011

Alternative Mechanisms to Resolve Disputes

1 Introduction

1.1 As part of the work relating to the work stream 'Alternative Mechanisms to Resolve Disputes', Ipsos MORI[1] were commissioned to undertake a qualitative study to explore the views of key audiences on the potential use of mediation in HPC's regulatory regime. The purpose of this paper is to provide Council with the background to that research and make recommendations as to how the work in this area should be taken forward.

2 Background

2.1 A comprehensive program of research has been carried out over the last four years looking at the fitness to practise process. This has included he use of mediation as one element in HPC's regulatory regime. The Executive have made it clear from the outset that the use of mediation would only be relevant in certain situations with certain cases, and it would not and could not be a tool for widespread use in the fitness to practise process.

2.2 In October 2007, Jackie Gulland was commissioned to undertake a scoping report on existing complaints mechanisms.[2] That review found that there was very little published research on complaints against the so called 'non-medical' professions regulated by the HPC. It also identified a number of barriers to complaining, including difficulties in obtaining information about the complaints procedure. A copy of that research can be found at

2.3 A potential area of future research highlighted in the Gulland report was the expectations of complainants when they make a complaint to a regulatory body. In June 2009, the Executive commissioned Ipsos MORI to undertake that research. The overall aim of that research was to determine the expectations of complainants in terms of

[1] Ipsos MORI, *Mediation Research: Research for the Health Professions Council: Final Report,* October 2011

[2] Gulland J (2008) Scoping report for the HPC on existing research on complaints mechanisms http://www.hpc-uk.org/assets/documents/10002AACScopingreportonexistingresearchoncomplaintsmechanisms.pdf

- The role of the regulator
- Initial expectations
- Case handling
- Outcome.

2.4 The Ipsos Report[3] (recommended that HPC should consider exploring '*opportunities for providing a mediation and conciliation process prior to complainants entering the formal fitness to practise process.'* As a result of this recommendation and the discussions at the Council away day in October 2009 on the role of alternative dispute resolution in the fitness to practise processes of a professional regulator, the Executive were asked to look into the issue further. In February 2010, the FTP Committee agreed a work plan on 'Alternative mechanisms to resolve disputes'. A copy of that work plan can be found at http://www.hpc-uk.org/assets/documents/10002C8A20100225FTP-11-alternativemechanismsfordisputes.pdf

2.5 That work plan included;

- a literature review of the material available in this area;
- a review of other organisations who undertake mediation;
- a review of consumer complaints; and
- Consideration as to whether it is appropriate to provide 'learning points to registrants where there has been a no case to answer or not well founded decision

2.6 The purpose of the commissioned literature review was to explore both the material available in the area and any evaluation of the benefit and usefulness of the mediation, ADR and conciliation processes adopted by other organisations. The literature review[4] was undertaken by Charlie Irvine and colleagues at the University of Strathclyde Law School. The review, along with a presentation on the findings was considered by the Fitness to Practise Committee at its meeting in October 2010. A copy of that review is attached to this paper as appendix three.

2.7 At that meeting, the Committee agreed that further exploration of the issue was appropriate in order to inform HPC's approach in this area. In February 2011, the FTP Committee considered a range of papers on the topic. Copies of those papers can be found at http://www.hpc-uk.org/assets/documents/10003331201102 16FTP05-alternativemechanismsfordisputes.pdf

2.8 Those papers included legal advice on the implications of the proposals set out in the Irvine report, an analysis of cases where it might be

[3] Ipsos MORI, *Expectations of the Fitness to Practise Complaints Process: Research for the Health Professions Council, Final Report,* January 2010 http://www.hpc-uk.org/assets/documents/10002C8520100225FTP-06-expectationsofcomplainants.pdf

[4] Irvine C, Robertson R, Clark B (2010), *Alternative mechanisms for resolving disputes; a literature review*

appropriate to consider using mediation, the rationale for mediation and other mechanisms for resolving disputes in addition to the fitness to practise process, other relevant models of mediation and a research brief to commission the views of registrants, complainants and other stakeholders.

2.9 The legal advice provided by the Solicitor to the Council provided that '*Examining how disputes between registrants and service users may be resolved is clearly part of 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 voluntarily mediation pilot project to see if there is value in, and demand for, such a process.'* A complete copy of that advice can be found in the papers referenced at paragraph 2.6.

2.10 In May 2011, the HPC held a stakeholder event on the topic of alternative mechanisms to resolve disputes. That event was well attended by a range of stakeholders with delegates asked to discuss:

- the use and value of mediation for professional regulators;
- whether ADR should have a role in the fitness to practise; process of professional regulator; and
- what issues arise in relation to accountability and perceptions of the regulator.

The feedback raised a number of questions and different possibilities for potential pilot studies.

2.11 In May 2011, the Fitness to Practise Committee considered a paper which looked at the wider use of alternative mechanisms to resolve disputes by the HPC. That paper which can be found at http://www.hpc-uk.org/assets/documents/100034F820110526FTP08-altmechanismstoresolvedisputes.pdf looked at the definition of alternative dispute resolution in the HPC context where it can be described as '*an alternative and proportionate mechanism to the formal adversarial hearings used to deal with the fitness to practise of registrants'.* The initiatives implemented to develop and improve upon the way in which the Council handle fitness to practise allegations include:

- **the Standard of Acceptance for Allegations -**which provides more detail on the contexts in which the HPC is unlikely to take an allegation forward.
- **Learning points-** where appropriate panels considering cases at the Investigating Committee stage can include learning points in their decisions where they find that there is no case to answer.
- **Disposal of cases via consent –** this is a means by which the HPC and the registrant concerned may seek to conclude a case without the need for a contested hearing.

- **Discontinuance –** this is a process by which all or part of proceedings can be halted without the needs for substantive fitness to practise hearing

3 Ipsos MORI Research

3.1 In October 2011, the Ipsos MORI research on the views of key audiences on the potential use of mediation within the HPC's regulatory regime was published. In that research, five recommendations were made regarding how HPC could consider progressing its work in this area. Those recommendations can be found on page 3 and 4 of the report and suggest that HPC should consider:

- proceeding with a pilot to provide empirical data given the diversity of opinion and polarisation of views across participants;
- running a staged pilot which lays the foundation stones for mediation at different points in the fitness to practise process given the perceived benefits and associated risks are different at different points in the fitness to practise process;
- providing clear messages about HPC's regulatory regime;
- communicating explicitly about mediation; and
- additional ways to enhance the fitness to practise process.

3.2 The FTP Committee at its meeting in October 2011, considered the recommendations relating to additional ways to enhance the fitness to practise process. A verbal report will be provided about the discussions of the Committee at the Council meeting.

4 Other settings

4.1 The outcomes of the most recent Ipsos research reflect the findings of preceding research reports commissioned by the HPC in several respects. For example, they all suggest that mediation is not well understood but is very well received by those who have use of it. This mirrors the findings in other settings, some of which are outlined below.

4.2 The greater use of mediation in other jurisdictions is not a new development. Regulators in North America (specifically in Ontario) have developed models for its use and the County Courts in England and Wales have been encouraged to use it more.

4.3 The Irish Medical Council has a mediation power and has issued guidance on the subject. Section 62 of the Medical Practitioners Act 2007 specifically provide for ADR and the issuing of guidelines.

4.3 Sir Henry Brooke, the first Shadow President of the Tribunal and the chair of the Civil Mediation Council, wrote an article for the Spring 2011 edition of the judicial college journal 'Tribunals' entitled '*Rethinking what we're trying to achieve'* which has relevance for the Council's discussions on

this topic.[5] A copy of that article is attached to this paper as an appendix. In that article Brookes comments that *'The overall message from all these reports – and from other reports on the take – up of mediation in different parts of the public law field – is that there is unquestionably a place for alternative or proportionate dispute resolution techniques, but we still have a lot to learn about the types of cases that are particularly appropriate for a mediator's skills, and about the reasons for comparatively low take –up of mediation services.'* He also comments that '*there is now a flourishing debate about the value of neutral third party intervention as a way of resolving disputes more quickly, more economically, and with a far higher level of customer satisfaction.*

4.4 CHRE in its report on 'Modern and Efficient Adjudication' recommended that regulators should take a more flexible approach to adjudication. Any work that the Council does in this area can only support that aim.

5 Pilot

5.1 In a regulatory setting, there are clear examples of cases which should not resolved using a mediative approach or alternative mechanisms to resolve disputes. It is not appropriate in cases which raise wider public interest and public protection issues (examples of which have been provided in previous papers) and which cannot simply be regarded as a dispute between the registrant and service users. Nor can any use of alternative mechanisms to resolve disputes be seen as reducing the transparency of the fitness to practise process or administering justice behind closed doors. Informed consent from all parties (registrant, regulator and complainant) is essential in ensuring the success of any alternative dispute resolution initiative.

5.2 The FTP Committee were clear at its meeting in May 2011, that the development of any further work in this area should not reduce the transparency of the existing fitness to practise processes.

5.3 The pilot, if the Council are so minded to agree with the recommendations made by Ipsos MORI in its report, would have:

- a staged approach according to the phases of the fitness to practise process;
- clear eligibility criteria as to the types of cases that should be considered;
- a voluntary nature;
- a six month trial, or 6 cases (whichever comes sooner) for each phase of the process;
- pre and post evaluation measures to assess the impact of the mediation process for the parties using established evaluation tools including the costs of the scheme;
- a six month follow up on the success or otherwise of the process for both parties;

[5] Brookes, H, 'Rethinking what we're trying to achieve' *Tribunals,* Spring 2011, pp.2-4

- a clear communication plan in place around the pilot and its purpose; and
- a clear dissemination strategy at the conclusion of the study.

5.4 The Executive propose that planning, preparing and delivery of the pilot takes place in 2012-13 with advice sought from appropriate sources within the field.

6 Recommendations

6.1 The Council is asked to discuss this report and agree that the Executive should proceed with taking forward recommendations 1 and 2 of the Ipsos recommendations through a voluntary mediation project to determine the use and value of such a process to complainants, registrants and to contributing to ensuring public protection.

hpc health professions council

Research report

Alternative mechanisms for resolving disputes: a literature review

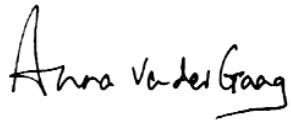
Contents

Foreword

I am delighted to welcome you to this monograph, the third in a series on research in regulation of the professions registered with the HPC. It is part of our commitment to building the evidence-base for regulation and being innovative in our approach. We will produce further publications over the coming years, each of which will explore different aspects of the regulatory landscape. We hope that over time these pieces of work will contribute not only to our own understanding of regulation in the health and social care sector, but also to that of a wider audience of stakeholders with an interest in this area.

Since the publication of the first of these research reports, we have recognised the need to further our understanding of complaints and complainants. In 2009 we commissioned Ipsos MORI to examine the expectations of complainants through a qualitative study. One of the recommendations of this work was to explore mediation as an additional methodology for resolving disputes. This monograph is in part a response to those recommendations. It is also a response to the Council's own expressed desire to explore innovative ways of approaching complaints and to reflect a wider movement towards listening and learning from concerns about practice.

I am grateful to the authors for providing such a clear overview of the literature on alternative dispute resolution and a commentary on its potential as a regulatory tool in handling certain types of complaints. We do not yet know how alternative dispute resolution will be used in our regulatory process but we are committed to undertaking further work to explore the use and value of mediation in an HPC context. The results of the pilot, together with this report, will undoubtedly contribute to the future direction of the Council and its approach to handling concerns about registrants.



Anna van der Gaag
Chair

Acknowledgements

This research report was prepared by Charlie Irvine, Rachel Robertson and Bryan Clark of the University of Strathclyde in September 2010 for the Health Professions Council (HPC).

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Views expresses in this report are those of the authors and not the HPC.

Executive summary

This literature review for the Health Professions Council (HPC) focuses on the use of alternative dispute resolution (ADR) in the resolution of complaints or disputes between professionals and their clients. It provides an overview of the field before turning to issues of policy and practice such as the relationship between complaints handling and professional regulation; the 'public interest'; apologies; and confidentiality. It reviews the use of ADR in a number of settings worldwide. Many of these studies show that initial responses to mediation are at best hesitant and at worst dismissive. However, once established, mediatory processes were judged by those involved to be both beneficial and effective.

The literature indicates that a mediatory approach in a regulatory setting could add value to current processes for dealing with fitness to practise allegations. Certain conditions apply: for example, mediation needs to be offered early in the process, with an emphasis on face-to-face communication between the complainant and registrant, to facilitate explanation, apology (where appropriate and genuine) and plans for future learning and prevention. A 'mediation manager' plays a significant part in the success of those schemes that have been widely used, effectively acting as 'champion' during the introduction of an approach that may be unfamiliar or even regarded with suspicion by potential participants. The review also highlights two potential mechanisms for ensuring that mediated outcomes align with the HPC's duty to protect the public: to refer these back to the Investigating Panel for ratification, and / or to have an HPC partner (with direct knowledge of the profession concerned) as part of the mediation process.

The HPC's current statutory framework also provides for mediation to occur after an allegation has been upheld. This has much in common with a process known as 'restorative justice' where the emphasis is on acknowledging and apologising for harm, allowing the person harmed to describe how they were affected and to participate in the discussion of remedial steps. The review suggests describing such a step as a 'restorative meeting' and offering this as another opportunity for mediation, where appropriate.

Throughout the literature there is an emphasis on learning from past errors in order to improve the quality of future practice. This is positively linked to satisfaction with regulatory and complaints processes on the part of both complainants and professionals. Mediation's potential for face-to-face discussion and ability to deliver a range of possible outcomes suggest that it could help the HPC to deliver these desirable outcomes within its fitness to practise process. At the same time, the HPC would need to take active steps to ensure that any such scheme was clearly explained, publicised and utilised.

Introduction

The purpose of this study is to provide information for the Health Professions Council (HPC) on the use of mediation and other forms of alternative dispute resolution (ADR) in dealing with complaints against health and wellbeing professionals. ADR is a term that embraces a range of alternatives to adjudication or investigation, including mediation, conciliation and 'frontline resolution.'[1] The HPC's interest in these practices stems from a report prepared for it by Ipsos MORI[2] which indicated a lack of understanding of its fitness to practise process among members of the public and the professions.[3] One of this report's suggestions was that some form of mediation could prevent a proportion of complaints from reaching a formal investigation.[4]

The Health Professions Council was established in 2002 by the Health Professions Order 2001 enacted under section 60 of the Health Act 1999. Its function is to protect the public by ensuring high standards among fifteen professions working in the health and wellbeing arena.[5] It enforces these standards via its fitness to practise process. While the main trigger for investigating a registrant is a complaint,[6] the HPC is clear that its approach differs from other complaints processes. It is not designed to punish professionals for harm done, nor to resolve disputes between them and their clients: rather, its focus is on whether these professionals are fit to practise.[7]

1 A term coined by the Scottish Public Services Ombudsman (SPSO) in *Consultation on a Statement of Complaints Handling Principles and Guidance on a Model Complaints Handling Procedure,* p. 13, available at www.spso.org.uk. Referrered to hereafter as SPSO (2010).

2 Ipsos MORI, *Expectations of the Fitness to Practise Complaints Process: Research for the Health Professions Council: Final Report,* January 2010.

3 "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." From minutes of the HPC Fitness to Practise Committee, 25 February 2010, p. 3.

4 "Key stakeholders, complainants, registrants and members of the public all said they would be keen to see a mediation stage in the fitness to practise process. It was felt that often an explanation or apology would be enough to see a satisfactory resolution to many complaints." Ipsos MORI, 2010, p. 21.

5 Arts therapists; biomedical scientists; chiropodists / podiatrists; clinical scientists; dietitians; hearing aid dispensers; occupational therapists; operating department practitioners; orthoptists; paramedics; physiotherapists; practitioner psychologists; prosthetists / orthotists; radiographers; and speech and language therapists.

6 Described in the relevant legislation as an 'allegation' (Health Professions Order 2001, S. 22).

7 "Fitness to practise proceedings are about protecting the public. They are not a general complaints resolution process, nor are they designed to resolve disputes between registrants and service users. Our fitness to practise processes are not designed simply to punish registrants for past mistakes they have made or harm they may have caused. Our processes allow us to take appropriate action to protect the public from those who are not fit to practise either at all or on an unrestricted basis." *Fitness to Practise Annual Report 2010* (London: Health Professions Council, 2010), p. 4; see also www.hpc-uk.org/assets/documents/10002FD8FTP_What_does_it_mean.pdf

The distinction between professional regulation (where the focus is on the registrant's conduct, competence and fitness to practise) and complaints handling (where the emphasis is on the patient / consumer's experience), may lead to some confusion for members of the public who complain. If, for example, a registrant has made a mistake that caused harm to the complainant, but is unlikely to repeat it and is currently fit to continue practising, the HPC may choose not to impose any restrictions on that person. The complainant, however, may feel that their complaint has not been taken seriously. In these circumstances another potential benefit of ADR is the opportunity for face-to-face discussion,[8] allowing complainants to receive an explanation and, where appropriate, an apology. It may also enable registrants to improve the quality of their practice in future through hearing first-hand about the impact of their actions on complainants.

The idea of learning from complaints in the interests of quality improvement chimes well with the priorities of the Council for Healthcare Regulatory Excellence: "As regulators review their standards and guidance, we consider that they should address issues raised by patients, service users and carers, through surveys and other research, as well as new statutory developments."[9]

This review considers whether existing research provides evidence that ADR could achieve these three purposes: to resolve appropriate cases without formal investigation, to enhance user satisfaction with the fitness to practise process and to support quality improvement and learning for registrants.

[8] See Section 2.3 below.

[9] Council for Healthcare Regulatory Excellence, *Improved Performance Through Regulation: Annual Report 2009 – 10*, (London: Council for Healthcare Regulatory Excellence, 2010), p. 12.

1 Alternative dispute resolution

1.1 Definitions and terminology

The brief for this Literature Review states that "mediation and ADR are only two mechanisms and that there may be other approaches that the HPC could adopt" to help it fulfil its wider goals in relation to fitness to practise. This phrase highlights the need for clarity: strictly speaking mediation is just one form of ADR. Some historical background may be useful here.

While mediation is undoubtedly an ancient practice,[10] the idea of alternative ways of delivering justice began to appeal to twentieth-century Western legal systems as courts grew busier, delays longer and costs greater. American legal academic Frank Sander is credited with coining the phrase 'alternative dispute resolution'[11] in 1976. He also used the term 'multi-door courthouse'; the idea being that an individual with a problem would find doors marked variously 'arbitration', 'mediation', 'negotiation' and 'litigation'.

So, ADR describes alternatives to the formal, state-sponsored adjudication system. Mediation is the best known but ADR also includes arbitration and a range of innovations with titles such as Early Neutral Evaluation, Mini-trial, Med-Arb, Arb-Med, Collaborative Law and Restorative Justice.[12] Some have questioned the 'otherness' of ADR, suggesting that 'Appropriate Dispute Resolution' is a more suitable title.[13] In this review we speak mostly of mediation, defined as: any setting where two or more people with a dispute or disagreement are helped to resolve it by a third person who does not impose a judgement.[14] Where other practices appear useful we will try to describe them as accurately as possible. For example, the Scottish Public Services Ombudsman has recently issued a report which refers to 'Frontline Resolution', meaning: "'On the spot' apology, explanation, or other action to resolve the complaint quickly."[15] This is quite distinct from mediation, as no third party is involved, and may prove a useful first step in preventing some matters from entering formal processes.

[10] Abel, R (1983) 'Mediation in Pre-Capitalist Societies' in *Windsor Yearbook of Access to Justice 175-185*, p. 181; Roebuck, D (2007) 'The Myth of Modern Mediation' in *73 Arbitration* (1) 105-116, p. 106.

[11] Sander, F (1976) 'Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice' (Apr. 7-9, 1976), in *70 F.R.D. 111,111*.

[12] See Bingham, L, Nabatchi, T, Senger, J and Jackman, M (2009), 'Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes in *24 Ohio State Journal on Dispute Resolution*.

[13] Menkel-Meadow, C (2010) 'Empirical Studies of ADR: The Baseline Problem of What ADR is and What It is Compared to' in Cane, P and Kritzer, H (eds.) *Oxford Handbook of Empirical Legal Studies* (forthcoming); Sander, F and Rozdeiczer, L, (2005) 'Selecting an Appropriate Dispute Resolution Procedure: Detailed Analysis and Simplified Solution', in Moffitt, M and Bordone, R (eds.) *The Handbook of Dispute Resolution*, San Francisco: Jossey-Bass.

[14] Alternatives to mediation are discussed at Section 4.2 below.

[15] SPSO (2010), p. 13.

1.1.1 Conciliation or mediation?

The terms 'conciliation' and 'mediation' are often used interchangeably. In the early 1990s family conciliation services transformed into family mediation services without significantly altering their practice. Recently the UK Disability Conciliation Service became the Equalities Mediation Service.[16] Nonetheless, subtle differences of meaning persist. Platt states:

"In the UK the Department of Health uses the word 'mediation' primarily in relation to clinical litigation and personal injury claims. In contrast, the term 'conciliation' tends to be reserved for the process used in relation to the complaints procedure."[17]

As we discuss below,[18] the HPC's fitness to practise process is neither litigation nor a typical complaints process, with the HPC effectively a third party acting in the public interest. However, some additional characteristics are also said to distinguish conciliation from mediation: a longer timescale, no requirement for face-to face meetings and a more "proactive or interventionist"[19] approach than mediation.

This last quality may imply that the term is preferable for the HPC. Platt also suggests that the conciliator in some settings will ensure that the rights of one of the parties are reflected in any proposals, and that these rights (patients' rights, for example) are non-negotiable.[20] This corresponds to the 'norm-advocating' style of mediation (see below). While Platt's perspective is valuable, for the purposes of this review we use the term mediation owing to its wide international currency and broadly agreed meaning.

1.2 The HPC's legislative framework

As noted above, the Health Professions Council is a statutory body.[21] Its principal functions are "to establish from time to time standards of education, training, conduct and performance for members of the relevant professions and to ensure the maintenance of those standards",[22] with the main objective being to "safeguard the health and well-being of persons using or needing the services of registrants."[23] The Council's primary tool in achieving these aims is the Register.

16 See www.equalities-mediation.org.uk; for a thorough explanation of its work see www.adrnow.org.uk/go/SubPage_38.html

17 Platt, A. W. (2008) *Conciliation in Healthcare: Managing and Resolving Complaints and Conflict* (Oxford: Radcliffe Publishing), p. 7.

18 At Section 2.1.

19 Platt (2008) p. 10.

20 *Ibid*, p. 11.

21 Health Act 1999, Section 60: Regulation of health care and associated professions
(1) Her Majesty may by Order in Council make provision –
(b) regulating any other profession which appears to Her to be concerned (wholly or partly) with the physical or mental health of individuals and to require regulation in pursuance of this section.

22 Health Professions Order 2001 s.3(2).

23 *Ibid*, s.3(4).

To supplement this and assist the Council in its role, the Order creates four committees: the Education and Training Committee; the Investigating Committee; the Conduct and Competence Committee; and the Health Committee. These last three come within the Council's Fitness to Practise function, under which, the Council must:

"(a) establish and keep under review the standards of conduct, performance and ethics expected of registrants and prospective registrants and give them such guidance on these matters as it sees fit; and

(b) establish and keep under review effective arrangements to protect the public from persons whose fitness to practise is impaired."

The Order provides a framework for complaints handling which concentrates on allegations that the professional's fitness to practise is impaired. This may be by reason of:

- misconduct;
- lack of competence;
- a conviction or caution;
- the physical or mental health of the Registrant;
- a determination by another body that fitness to practise is impaired;
- the person is on a barred list (within the meaning of the various Safeguarding Vulnerable Groups Acts); or
- that their entry in the Register has been fraudulently procured or incorrectly made.[24]

Once an allegation has been made to the Fitness to Practise Department, the Investigating Committee first considers whether or not it concerns the professional's fitness to practise. If it does not, a 'no case to answer' decision will be made and the complaint dismissed. If there is a fitness to practise case to answer, the Investigating Committee has three options. It can:

- make an interim order (suspension or conditions of practice);
- refer the case to mediation; or
- forward it to a hearing committee.[25]

The available outcomes for the Investigating Committee (which itself hears cases of incorrect or fraudulent entry to the Register) are:

- no case to answer; or
- amend or remove an entry in the Register.

For the Health or Conduct and Competence Committees the possible outcomes are:

- no further action;
- suspension order;
- conditions of practice order;
- caution order; or
- striking-off order (in lack of competence and health cases only available where a registrant has been continuously suspended for at least two years).

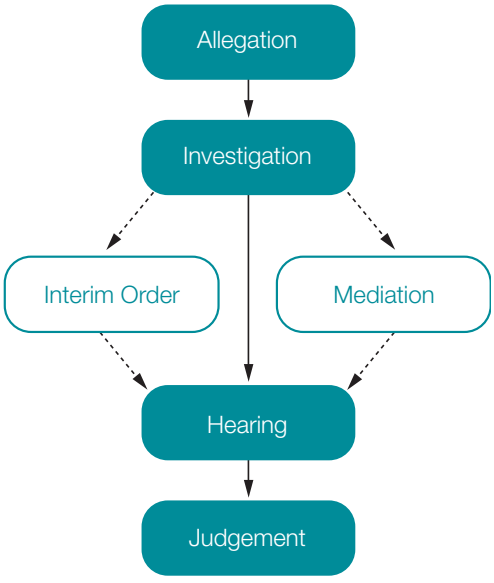
Mediation may also be used as a final outcome from these two committees.

[24] s.21(1) (a) Health Professions Order 2001.

[25] The Investigating Committee is the hearing committee for any allegations about a fraudulent or incorrect entry to the Register. The Health Committee deals with allegations about a professional's physical or mental health. The Conduct and Competence Committee deals with the other allegation types.

The current fitness to practise process is outlined below.

Figure 1– Fitness to practise: An overview of the process



1.2.1 ADR within the Health Professions Order

Mediation appears at three points within the Order. First, it is an option for screeners (those who conduct the preliminary screening of allegations) to mediate prior to a hearing.[26] However, this can only be done at the request of the Practice Committee, a requirement which may work against screeners taking the initiative in offering mediation and the "aim of dealing with the allegation without it being necessary for the case to reach the stage at which the Health Committee or Conduct and Competence Committee, as the case may be, would arrange a hearing."[27] Next, when the Investigating Committee finds there is a case to answer, it may mediate itself or refer the matter to screeners for them to mediate.[28] In this case, if the mediation is unsuccessful there is no provision to refer the case back to the Investigating Committee. Finally, the Order provides for mediation after an allegation has been investigated and declared to be well founded.[29] To date no mediations have taken place.

The fact that mediation has never been used may be the result of its ambiguous place in the fitness to practise process. In spite of the wide statutory mandate enabling its use throughout the process, the HPC's Practice Note on Mediation seems to rule it out in all but the most minor cases:

[26] HPO S.24 (3) (d).

[27] HPO S.24 (3) (d).

[28] HPO S.26 (6).

[29] HPO S.29 (3).

"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 […] where its use would fail to provide necessary public safeguards and seriously undermine confidence in the regulatory process […] Mediation may (but will not always) be appropriate in minor cases that have not resulted in harm."[30]

1.3 Mediation

Mediation has undergone considerable expansion in the last twenty years, both as a practice and as a subject of academic study.[31] It would be misleading to suggest that it is a homogenous practice: one form of mediation may be barely recognisable to another.[32] Most official discourse on mediation in the UK anticipates a facilitative, non-directive process in which the mediator acts as a conduit to aid the participants' discussions and negotiations.[33] In this model, the content of any agreement reached is crafted by the parties themselves without the mediator voicing an opinion on whether the outcome is just, appropriate or fair.

Empirical evidence suggests that mediators in practice are more directive, manoeuvring parties into particular settlements.[34] Similarly, the mediation process may be more evaluative, where the mediator "focuses [...] on the legal claims, assesses the strengths and weaknesses of those claims [and predicts] the impact of not settling."[35] Leonard Riskin adds a further dimension, suggesting that mediators within the justice system adopt a 'narrow' or 'broad' approach. A narrow orientation focuses on the legal and monetary issues, while a broader orientation looks at the parties' relationship, longer-term interests and wider societal or public-interest issues.[36]

30 Health Professions Council, Mediation Practice Note, October 2009, p. 3, www.hpc-uk.org/assets/documents/10001DDCPRACTICE_NOTE_Mediation.pdf

31 For example, a recent review lists 91 monographs published in English since 2008: Brown, B (2010) *A Practical Bibliography of Books for the Mediation Practitioner (2010 Update)* www.mediate.com/articles/brownB1.cfm

32 While mediation may represent a simple negotiation process aided by a third party, as Carrie Menkel-Meadow suggests "[i]n its most grandiose forms, mediation...[may] achieve the transformation of warring nation states, differing ethnic groups, diverse communities, and disputatious workplaces, families and individuals, and to develop new and creative human solutions to otherwise difficult and intractable problems[…] it is a process for achieving interpersonal, intrapersonal and intrapsychic knowledge and understanding." Menkel-Meadow, C, 'Introduction' in Menkel Meadow, C (ed.) (2001) *Mediation: Theory, Policy and Practice* (Aldershot: Ashgate/Dartmouth) at xiii-xiv.

33 See, for example, the Civil Mediation Council's definition of mediation, which adopts the European Code of Conduct for Mediators: www.cmcregistered.org/pages/3/european-code-of-conduct-for-mediators-

34 See, for example, Dingwall, R and Greatbatch, D (2000) 'The Mediation Process' in Davis, G *Monitoring Publicly Funded Family Mediation* (London: Legal Services Commission), p. 251.

35 McAdoo, B and Welsh, N, 'Does ADR really have a place on the lawyer's philosophical map?' in *Hamline Journal on Public Law and Policy*, 18 (1997), pp. 376–393, at p. 389.

36 See Riskin, L, 'Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed' in *Harvard Negotiation Law Review*, 1, (1996), pp. 7–52.

Ellen Waldman has suggested an alternative typology based on the norms according to which mediation decisions are made. She names three styles: 'norm generating', 'norm educating' and 'norm advocating.'[37] Under the norm-generating approach, the parties themselves provide the norms according to which the outcome is judged. A norm-educating mediator goes further, providing information on applicable legal and societal norms, but still leaving it to the parties to decide which, if any, they choose to apply. And a norm-advocating mediator insists that any settlement reached reflects particular applicable norms: "In this sense, her role extended beyond that of an educator; she became, to some degree, a safeguarder of social norms and values."[38] The HPC's duty to protect the public interest may mean that this last approach is the most appropriate.[39] In the UK the Equalities Mediation Service is the clearest example of a norm-advocating approach, as this description indicates:

"The mediator must ensure that any agreement is in line with rights and responsibilities set out in the Disability Discrimination Act, or in other relevant discrimination legislation."[40]

Finally, although most mediation can be described as settlement-oriented, 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.[41] 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, as we discuss below, supporting direct communication may be the most important benefit of mediation.[42]

37 Waldman, E, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' *Hastings Law Journal*, 48, pp. 703–770.

38 *Ibid*, p. 745.

39 Waldman gives the example of an end of life mediation where the mediator had to ensure that both legislative and professional ethical standards were taken into account in the final agreement.

40 www.adrnow.org.uk/go/SubPage_38.html

41 See Bush, R A B and Folger, J P, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (2nd Edition)* (San Franciso: Jossey-Bass), 2005.

42 For a review of transformative mediation's use in an employment context see Bingham, L, Hallberlin, C, Walker, D, and Won-Tae Chung, 'Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace' in *Harvard Negotiation Law Review*, 14 (1), pp. 1–50.

1.4 Critiques of ADR

The mediation process has been positively evaluated in a number of contexts.[43] Claimed benefits include speed (compared to the formal adversarial process); reduced cost; empowerment (in that parties retain decision-making power); creativity (going beyond the courts' "limited remedial imagination");[44] capacity to preserve relationships; and the power of a face-to-face encounter ("What pervaded disputants' talk on mediation agendas was their wanting to directly communicate their perspectives, be heard, seen, and understood").[45] It is also a commonplace that mediation attracts high satisfaction ratings from users.[46]

There are however recognised concerns about the use of mediation.[47] These include the possibility that existing power imbalances may be exacerbated; the abrogation of legal entitlements; concerns about procedural justice; and the lack of public pronouncement of decisions.

1.4.1 Power imbalances

Power imbalances between disputing parties can take many forms: for example, financial and legal resources, expert knowledge, prior experience, confidence and eloquence. This has been a source of particular concern in disputes between lay persons and both professionals and government agencies. And if the mediation process, to use Waldman's typology, is 'norm-generating', (ie where parties themselves choose the norms according to which the outcome is judged) then imbalances of power or resources could in turn lead to unfair solutions.[48]

[43] For a thorough review of the field see Jones, T (ed.) (2004) 'Conflict Resolution in the Field: Assessing the Past, Charting the Future' in *Conflict Resolution Quarterly*, 22, 1 and 2, which has chapters on court connected, community, employment, victim-offender and environmental mediation as well as conflict education. In terms, for example, of settlement rates, user satisfaction and cost and time savings, see also Prince, S (2007) 'Institutionalising Mediation? An Evaluation of the Exeter small claims mediation pilot' *5 Web Journal of Current Legal Issues* available at http://webjcli.ncl.ac.uk/2007/issue5/prince5.html; Doyle, M (2006) *Evaluation of the Small Claims Mediation Service at Manchester County Court* (London: Department of Constitutional Affairs), available at www.dca.gov.uk/civil/adr/small-claims-manchester.pdf (accessed 31 August 2010); Ross, M and Bain, D (2010) *In Court Mediation Pilots: Report on Evaluation of In Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts* (Scottish Government, Courts and Constitution Analytical Team), www.scotland.gov.uk/Resource/Doc/310104/0097858.pdf. Evaluations of mandatory mediation have been less positive: see for example, Genn, H *et al Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure* (2007: Ministry of Justice)

[44] Menkel-Meadow, C, '*Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*', South Texas Law Review, 38, 407, 1997, p. 452.

[45] Relis, T, (2009) *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties*, (Cambridge: Cambridge University Press), p. 153.

[46] For example see Ross and Bain (2010); Doyle (2006).

[47] As a rule of thumb the criticisms gain greater potency the more that mediation is institutionalised and the less that parties exercise informed consent.

[48] One of the most cogent critiques of the handling of inter-party power dynamics in mediation was launched by Trina Grillo in Grillo, T, 'The Mediation Alternative: Process Dangers for Women, *Yale Law Journal*, 100 (6), 1991, pp. 1545-1610; see also Delgado, R et al (1985) 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' *Wisconsin Law Review* 1359.

Given mediation's commitment to impartiality, it can be argued that there is little the mediator can do to alleviate the impact of one party's superior resources, leading to potential injustice for the weaker party.[49] On the other hand, some of these imbalances can be addressed where both parties have access to legal representation or the mediation process is more explicitly 'norm educating' or advocating.[50] Even standard facilitative mediation may alleviate power imbalances, for example, by the impact of mediators' treating both parties with respect, listening with care, and such matters as controlling how both parties are greeted, seated and addressed.[51] It is also important to acknowledge that such imbalances can persist in formal adjudicatory settings.

1.4.2 Mediation, the abrogation of legal entitlements and 'justice'

Another critique holds that mediation may lead to a denial of justice.[52] It argues that, in contrast to adjudication where an authoritative neutral judge renders a decision based on relevant legal norms, in mediation claims are reframed through a 'harmony'[53] lens into non-legal disputes to be resolved through discussion and compromise.[54] Leaving aside the nuanced issue of the imperfect application of law,[55] such arguments squarely equate justice with the law and rule out other considerations and norms as barometers of justice. Yet justice is not the monopoly of the law; in fact, parties may not regard legal outcomes as just.

[49] As Professor Dame Hazel Genn colourfully remarked recently, "[t]he outcome of mediation is not about **just** settlement, it is **just about settlement**.", Genn, H, Judging Civil Justice: *The Hamlyn Lectures 2008* (Cambridge: Cambridge University Press, 2010) at p. 117.

[50] Albeit that such an approach by the mediator may appear biased and lead to a lack of perceived impartiality – see for example Kovach, K K, 'Mapping Mediation: The Risks of Riskin's Grid' *Harvard Negotiation Law Review*,3, 71, 1998, pp. 71–110. For a discussion of the issue of power imbalances in mediation, see Irvine, C (2009) Mediation and Social Norms: A Response to Dame Hazel Genn' in *Family Law 39*, 2009, pp. 352–57.

[51] See Davis, A, and Salem, R, 'Dealing with power imbalances in mediation of interpersonal disputes' in Lemmon, J (ed.) *Procedures for Guiding the Divorce Mediation Process* (San Francisco: Jossey-Bass, 1984); Subrin, S (2002) 'A traditionalist looks at mediation: It's here to stay and much better than I thought' *3 Nevada Law Journal*, pp. 196-231.

[52] See generally Auerbach, J. S (1983) *Justice Without Law? Resolving Disputes Without Lawyers* (New York: Oxford University Press;Abel, R (1984) *The Politics of Informal Justice* New York: Academic Press.

[53] Nader, L, 'Controlling Processes in the Practices of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology' in *Ohio State Journal of Dispute Resolution*, 9, 1993, pp. 1–25.

[54] See, for example, the discussion in Genn (note 49 above) at pp. 114–21; Brunsdon-Tulley, M 'There is an 'A' in 'ADR' but Does Anybody Know What It Means Anymore?' *Civil Justice Quarterly*, 28 (2), 2009, pp. 218–36.

[55] For an illuminating discussion see Subrin (2002).

Recent research indicated that parties regarded lawyers' focus on legal tactics as trivialising issues of importance to them.[56] They may be seeking something entirely different from mediation, such as apology or explanation.[57]

1.4.3 Procedural justice

Substantive or distributive justice concerns outcomes: procedural justice refers to the process by which those outcomes come about. Procedural justice literature focuses on participants' perceptions of the fairness of decision-making procedures.[58] Parties' perceptions of procedural fairness have consistently been found to impact on their overall assessment of encounters with decision-making bodies, independent of outcomes. Citizens are more likely to view outcomes as fair if they judge that the process by which those outcomes have been arrived at was in itself procedurally fair.[59] While the bulk of research in the area has focused on criminal justice,[60] it has more recently become influential in the study of administrative justice in the UK.[61] Three primary factors contribute to assessments of procedural fairness: voice (the opportunity to present views, concerns and evidence to a third party), being heard (the perception that the "third party considered their views, concerns and evidence")[62] and treatment (being treated in "a dignified, respectful manner").'[63]

Procedural justice norms have been brought to bear in the scrutiny of mediation.[64] It seems that mediation's promise of party empowerment and self-determination may be largely meaningless if the process does not exhibit the key characteristics of procedural justice.

56 Relis (2009).

57 Research conducted in Scotland in 1997 found that, while around half of disputants surveyed wanted financial compensation, 43 per cent wanted an apology and 41 per cent wanted an explanation – Scottish Consumer Council, *Civil Disputes in Scotland: A report of consumers' experiences* (1997). See also McFarlane, J (2009) *The New Lawyer*, chapter 6; Clark, B (2009) 'Mediation and Scottish Lawyers: Past, Present and Future' in *Edinburgh Law Review*, 13, pp. 252–74.

58 "three decades of socio-legal research have demonstrated that citizens also care deeply about the process by which conflicts are resolved and decisions are made, even when outcomes are unfavourable or the process they desire is slow or costly" MacCoun, R (2005) 'Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness' in *Annual Review of Law and Social Science*, 1, pp. 171–201, at p. 172.

59 Lind, A and Tyler, T, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988) pp. 66–70.

60 See, for example, Tyler, T and Huo, Y *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (New York: Russell Sage Foundation, 2002); Tyler, T *Why People Obey the Law* (Princeton, NJ: Princeton University Press, 2006)

61 Genn and others, 2006; Adler, M (ed.) (2009) *Administrative Justice in Context* (Oxford: Hart Publishing); Halliday, S and Scott, C (2009) 'A Cultural Analysis of Administrative Justice' in Adler (ed.) (2009).

62 Welsh, N, 'Making Deals in Court Connected Mediation: What's Justice Got to Do With It?' *Washington University Law Quarterly*, 79, 2001, pp. 788–858 at p. 820.

63 *Ibid*, p. 820; Welsh suggests that a fourth factor, neutrality, might be expected to feature, but people seem to have been more influenced by the third party's attempts at even-handedness and attempts at fairness.

64 See Welsh, N (2002) 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice' in *Journal of Dispute Resolution*, 1, pp. 179–192; Welsh, N (2001) 'Making Deals in Court Connected Mediation: What's Justice Got to Do With It?' in *Washington University Law Quarterly*, 79, pp. 787–865.

There is some evidence that people perceive greater procedural fairness when decisions are made on their behalf by an authoritative third party.[65] However, Welsh suggests that a more nuanced reading of the literature reveals the importance of embedding procedural justice norms in all types of dispute resolution.[66]

1.4.4 Lack of public pronouncement

Another critique of mediation holds that it privatises dispute resolution, leading to the suppression of public norms. Formal adjudicative processes fulfil a democratic function concerned with "reinforcing values and practices."[67] They exist not simply to resolve citizens' disputes but to cast a shadow over society by providing rulings on acceptable and unacceptable behaviour. According to this argument, dispute resolution measures such as mediation, cloaked in confidentiality and privacy, may stifle the prospect of such 'lesson-learning' and lead to the "erosion of the public realm".[68] In the HPC's context, it could be argued that any attempt to divert some allegations to mediation prior to a determination prevents the Council from fulfilling its public role of upholding standards and norms.

1.5 Conclusion

We began by clarifying the meanings of ADR and mediation. We then considered the statutory backdrop to the HPC's fitness to practise process. The current legislation is ambiguous as to when mediation should be undertaken, by whom, and with what purpose, and this may be a contributing factor to its non-use to date. We set out a typology of mediation and suggested that, given the HPC's duty to protect members of the public and act in the public interest, it might consider a 'norm educating' or 'norm advocating' approach (where the mediator ensures that the parties take appropriate social or legal norms into account in arriving at an outcome). At the same time, the transformative approach may provide the clearest focus on those aspects of the fitness to practise process that have led complainants to ask for a mediation step: the desire for explanation, apology and reassurance that 'it won't happen to anyone else'. Mediation has also been subject to cogent critiques: its capacity to deal with power imbalances, potential to deliver less than formal legal entitlements, lack of an authoritative third party decision and privatisation of disputes have all come under fire. It would be wise for those adopting a mediatory approach to be conscious of these concerns and to take steps to address them.

[65] MacCoun (2005) p. 175.

[66] Welsh (2002).

[67] Genn, see note 49.

[68] See Luban, D (1995) 'Settlements and the Erosion of the Public Realm' *83 Georgetown Law Journal*, pp. 2619–62. For a counter view of such matters, see Menkel-Meadow, C (1995) 'Whose dispute is it anyway?: A philosophical and democratic defence of settlement (in some cases)' in *83 Georgetown Law Journal*, , pp. 2663–96.

2 Issues for the HPC

2.1 Consumerism v professionalism – complaints and the role of a regulator

As noted above, the HPC is a regulator rather than a complaints handling organisation.[69] Its fitness to practise process exists to "protect the public from those who are not fit to practise either at all or on an unrestricted basis."[70] However, a significant proportion of the cases it deals with are initiated by a complaint from a member of the public.[71] Below we consider the implications of the distinction between professional regulation and complaints handling.

There is a considerable body of literature on the subject of complaints and complaints handling, much of it relating to administrative justice – complaints by the citizen about actions or decisions of the state.[72] Brewer traces the influences on complaints handling models, from traditional ideas of citizenship to more recent consumerist perspectives.[73] The consumerist model frames complaints as learning opportunities leading to improved services. This creates an incentive for organisations and bureaucracies to 'harvest' complaints in the interests of quality improvement. According to Davis, however:

"Misconduct, by comparison, goes to the heart of what it traditionally means to be professional and draws into question the suitability of the practitioner to remain in practice, either at all or without additional safeguards."[74]

Even though some professions have in recent years lost the privilege of self-regulation, a framework of professional discipline rather than complaints handling can still be seen as a mark of status. It effectively processes the public's dissatisfaction with professionals on the professions' terms: 'lay' members of the public are not deemed to have the necessary skills and knowledge to determine whether a professional was acting competently. Davis acknowledges that this may depend on the issues at stake: "a matter which goes to the heart of a professional's competence or suitability to practise can be very different from a complaint that the service wasn't quite what the client expected."[75]

The HPC's primary focus is not on complaints (which generally concern past conduct) but rather with a professional's current and future fitness to practise. The results of the 2009 Ipsos MORI study of complainants' expectations suggest that complainants themselves do not necessarily understand or accept this distinction.[76] Some had hoped for

[69] See note 7.

[70] *Health Professions Council Fitness to Practise Annual Report 2010*, p. 4.

[71] 31 per cent in 2010, compared to 33 per cent from employers and eight per cent from other registrants or professionals, *Ibid*, p. 11.

[72] See for example Adler, M, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' in *Modern Law Review*, 69, 6, 2006, pp. 958–85; Boyron, S 'The rise of mediation in administrative law disputes: experiences from England, France and Germany' in *2006 Public Law*, pp. 319–44; SPSO, 2010.

[73] Brewer, B (2007) 'Citizen or customer? Complaints handling in the public sector' in *International Review of Administrative Sciences*, 73 (4), 2007, pp. 549–56.

[74] Davis, M (2010) The demise of professional self-regulation? Evidence from the "ideal type" professions of medicine and law' in *Professional Negligence*, 26 (1), pp. 3–38, at p. 25.

[75] *Ibid* (at note 97).

[76] Ipsos MORI (2010).

remedial action, some sought an informal, mediation approach and one said "I think I thought the HPC were going to sort the whole thing out, really."[77] The former Chief Medical Officer for England referred to a shift in society as a whole, with less deference to institutions: "Informed by access to health information that was once the sole preserve of the professions, the public are more likely to challenge received opinion."[78]

The potential mismatch between complainant expectations and the reality of a fitness to practise process raises important questions for this review.

- Can mediation's claimed creativity regarding solutions[79] open up alternative and desirable possibilities for fitness to practice cases?[80]
- Can the HPC endorse proposed outcomes from mediation that it deems useful but which go beyond its current remit?
- At what stage in the fitness to practise process is mediation most usefully placed?
- Is there a place for a regulator to deal with non-fitness to practise matters?

2.2 The public interest

One of mediation's principal claims is that it supports party self-determination.[81] This raises issues in relation to the public interest, as such an approach within the HPC's fitness to practise process would seem to place decision-making responsibility in the hands of complainants and registrants. Even if a decision is acceptable to both, it does not absolve the HPC from its duty to protect the public. How might a regulator strike an appropriate balance so that the public interest is protected without losing one of mediation's most distinctive benefits (self-determination)?

77 *Ibid*, p. 32.

78 Donaldson, L 'Introduction' in *Trust, Assurance and Safety: The Regulation of Health Professionals in the 21st Century*, 2007, p. 17, available at www.official-documents.gov.uk/document/cm70/7013/7013.pdf

79 Menkel-Meadow (1995) (cited at Note 68 above) at pp. 2687–94. Carrie Menkel-Meadow contrasts the law's limited remedial imagination with mediation's capacity for a range of creative outcomes.

80 The Equalities Mediation Service suggests at least nine potential mediation outcomes: "Apologies; explanations; compensation; changes in policy or procedures; arrangements for return to work or resume a course; references; staff training in disability awareness or equalities and diversity; information being made available in accessible formats; improvements and arrangements for future communication." See www.adrnow.org.uk/go/SubPage_38.html

81 For example, the Scottish Mediation Network's Code of Practice states: "Voluntary participation and self determination: A mediator shall recognise that mediation is based on the principle of voluntary participation and that it is the parties, rather than the mediator, who determine the outcome." See www.scottishmediation.org.uk/downloads/CodeofPracticeforMediationinScotland.pdf For a fuller discussion of the issues raised by this term see Irvine, C., 'Mediation's Values: An Examination of the Values Underpinning Mediation' (unpublished masters dissertation, University of London, Birkbeck College, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686195 ; Welsh, N., (2001) 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization in *Harvard Negotiation Law Review*, 6 (1), 2001, pp. 1–95.

The Health Professions Order 2001 effectively defines the public interest for the HPC:

"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."[82]

The report Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century provides further detail.[83] First and foremost is the "overriding" interest of patient safety and quality of care. Next is impartiality, as the HPC must show that it is "independent of government, the professionals themselves, employers, educators and all the other interest groups involved in healthcare." Then a balance must be struck between fulfilling the tasks of "sustaining, improving and assuring the professional standards of the overwhelming majority" and "identifying and addressing poor practice or bad behaviour". Actions need to be proportionate. And finally there is a holistic requirement that the regulatory scheme does all of the above while working to protect the strength and integrity of health professionals within the United Kingdom. Many of these seem to come down to trust: an effective regulator needs to be trusted by the public, employers and the regulated.

Some writers argue that ADR can actually do more to meet the public interest than traditional litigation, which "does not promote effective communication, information exchange, or learning to improve performance in health care delivery. Importantly, it induces silence by one party who has significant knowledge of direct and indirect factors surrounding the events."[84] While the HPC's hearing system is not the same as litigation, and efforts are made to ensure openness and transparency, its power to 'strike off' means it still risks inducing just such a silence in the registrant. Nonetheless, we recognise a significant issue for the HPC: if an allegation is referred to mediation, and if the mediator follows a traditional model seeking to support party self-determination, how can the HPC be assured that its duty to protect the public is also taken into account in the outcome?

One option would be to train mediators in Waldman's 'norm-advocating' style of mediation, where the mediator's role clearly includes advocating for particular norms: "the mediator not only educated the parties about the relevant legal and ethical norms, but also insisted on their incorporation into the agreement. In this sense, her role extended beyond that of an educator; she became, to some degree, a safeguarder of social norms and values."[85]

This may be challenging for existing mediators or health professionals trained in a facilitative style of mediation. There is, however, a parallel in the UK: mediators working for the Equalities Mediation Service ensure that outcomes comply with relevant legislation.[86]

82 Health Professions Order (2001) Article 3(4).

83 Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century Department of Health, February 2007, paragraph 6, www.official-documents.gov.uk/document/cm70/7013/7013.pdf

84 Liang, B, and Small, S (2003) 'Communicating About Care: Addressing Federal-state Issues in Peer Review and Mediation to Promote Patient Safety' in *Houston Journal of Health Law and Policy*, 3, pp. 219–64.

85 Waldman (1995) p.745; see Section1.3 above.

86 See www.equalities-mediation.org.uk

We encountered another model that may balance safeguarding the public interest with a mediatory process. In Alberta, Canada, the Health Professions Act[87] requires a representative of the college / profession to which the practitioner belongs to be present during mediation. While this person may be the mediator, they may also act as a separate party. For example, the College of Registered Nurses states:

"The College representative is present to discuss the nursing practice standards, code of ethics or any other nursing information necessary for the process and to assist with appropriate performance improvement based on the nature of the complaint and the admitted behaviours of the registered nurse. As well, the College representative ensures that the public interest is not overlooked in the agreement between the complainant and the registered nurse"'[88]

It is conceivable that a representative of the HPC could fulfil the same role, ensuring that any agreement is in the public interest. The presence of such an individual would also remove the need for the mediator to adopt a 'norm-advocating' role, leaving him or her free to facilitate the discussion without a further agenda.

Another way to ensure that the public interest is taken into account would be to require that any agreement reached through mediation be ratified by the regulator. A similar system already exists in relation to 'Disposal by Consent', where a registrant agrees to the same kind of measures that a fitness to practise panel would impose, without the need for a hearing. The HPC can only accept such a step, however, where it is satisfied "that:

– the appropriate level of public protection is being secured;

– and doing so would not be detrimental to the wider public interest."[89]

A similar standard could be applied to mediated outcomes, thus ensuring that the public interest is protected while still avoiding the need for a full hearing.

This discussion raises wider policy questions for the HPC. Liang and Small note that "to continuously promote safe and effective health care, both providers and patients must be active partners and participants in the system of delivery".[90] It could be argued that, when the healthcare system fails to meet the highest standards, the public interest will be best served by empowering both deliverers and recipients to participate in steps to learn from such failure and ensure it does not recur.

87 Discussed further at Section 3.8 below.

88 www.nurses.ab.ca/Carna/index.aspx?WebStructureID=859

89 See HPC practice note 'Disposal of Cases by Consent', p. 1. Available from www.hpc-uk.org/assets/documents/10002473PRACTICE_NOTE_ConsentOrders.pdf

90 Liang and Small (2003) p. 221.

2.3 Face-to-face encounters

An important theme throughout the literature is the significance of a face-to-face meeting between the two people most affected by the problem. In their study of US ADR schemes, Szmania et al noted that "a relatively high importance is placed on open, in-person communication for all the administrators we spoke with".[91] The Scottish Legal Complaints Commission's Mediation Manager stated: "when face to face with the person they wanted to 'beat up' they realise that this is just another person".[92]

2.3.1 Open communication

A study into patient expectations of complaints committees in the Netherlands[93] found that only 18 per cent of patients thought that the opportunity to "tell what happened personally" was not important, with 53 per cent rating this as very / most important.[94] Richardson and Genn note that: "The oral hearing, when well executed, gives the citizen the opportunity to be heard and to observe that they have, indeed, been heard by the tribunal."[95]

Mediation in the fitness to practise process would aspire to achieve the same result, ensuring that complainants are heard, and know they have been heard, by the registrant about whom they are complaining. It would also help to fulfil the elements of procedural justice:

- 'voice' (in that both complainants and registrants would have the opportunity to explain their views, concerns and evidence);
- 'being heard' (in that the mediator would be seen to consider these views concerns and evidence); and
- 'fair treatment' (in that, assuming mediators follow their own ethical codes, all parties will be treated in a "dignified, respectful manner".)[96]

Procedural justice studies consistently find that citizens' experience of a procedurally fair process enhances their respect for, and compliance with, the wider justice system,[97] and it is to be hoped that a similar impact would be seen within the HPC's fitness to practise process.[98]

91 Szmania, S, Johnson, A and Mulligan, M 'Alternative Dispute Resolution in Medical Malpractice: A Survey of Emerging Trends and Practices' in *Conflict Resolution Quarterly*, 26, 2008, pp. 71–96 at p. 79.

92 Interview with Marjorie Mantle, August 2010, see Appendix.

93 Friele, R, and Sluijs, E, *Patient expectations of fair complaint handling in hospitals: empirical data* (NIVEL, Netherlands Institute for Health Services Research,2006). Available from BMC Health Services Research, www.biomedcentral.com/1472-6963/6/106

94 *Ibid*, Table 1.

95 Richardson, G, and Genn, H, 'Tribunals in transition: resolution or adjudication?' in *Public Law*, 2007, pp. 116–41; See also Ross and Bain (2010), p.78: "A sense of unfairness or dissatisfaction arose when parties did not get a chance to speak about the merits of the claim early in the case."

96 See discussion in Section 1.4.3 above.

97 MacCoun (2005), p. 178.

98 This could also have a bearing on an issue identified by the Council for Healthcare Regulatory Excellence on sharing a registrant's response to the initial complaint with the complainant. See Council for Healthcare and Regulatory Excellence *Performance review report 2009/10 Enhancing public protection through improved regulation July 2010*, available at www.chre.org.uk/_img/pics/library/100806_Performance_review_report_2009-10_tagged.pdf The HPC's response to this report can be found at www.hpc-uk.org/aboutus/council/councilmeetings_archive/index.asp?id=523

2.3.2 Face-to-face communication

Face-to-face meetings also allow a 'real time' interaction:

"[face-to-face] meetings increase the chances that each party will clearly understand all the points at issue in the case. We know of situations in which, until a face-to-face meeting was held, the parties simply did not understand the opponent's arguments. We must create a climate where there are more opportunities for genuine interaction between the parties. Clarity is the key."[99]

Genuineness is also important: "all of the issues can be talked through in depth and a resolution may be possible at this stage."[100] The Medical Protection Society recognises the benefits for all parties – registrant, complainant and regulator:

"Arranging a face-to-face meeting will allow you to clarify the issues from the complainant's point of view […] You will then have an opportunity to discuss what the complaints process can and can't deliver if the complainant seems to have unrealistic expectations."[101]

Relis's study of Canadian medical malpractice mediation forcefully underlines the importance of face-to-face encounters to both 'sides': "What pervaded disputants' talk on mediation agendas was their wanting to directly communicate their perspectives, be heard, seen and understood."[102] This positive view of direct communication was shared by both plaintiffs and defending physicians.

2.3.3 Conclusion

The evidence suggests that open, in-person communication is one of the most popular features of mediation for its participants. For a proportion of complainants, the opportunity to tell their story and receive an explanation or apology may be all they seek from the fitness to practise process. As well as delivering a procedurally fair process, the use of ADR early in the progress of an allegation may allow some matters to be dealt with swiftly and directly, thereby avoiding the need for further investigation. The HPC, however, would still need to ensure that the public interest is protected and it may be that a 'triage' system is advisable,[103] allowing an early assessment of the likelihood of significant risk to the public if the registrant continues to practice.

Another, related, issue for the HPC to consider is the location of an ADR process, chronologically and geographically. Our review of ADR schemes around the world[104] illustrates that they are mostly used early in the progress of a complaint or problem. The HPC may wish to consider the practical ramifications of local dispute resolution, for example at the point of care. Is this something it could deliver, or might a partner organisation be better placed to intervene at this stage?

[99] Evans, D, 'LMAA arbitrations: observations of a user' in Arbitration, 76(3), 2010, pp. 399–404.

[100] Healthcare Commission, *Complaints Toolkit: Handling complaints within the NHS*, March 2008, paragraph 5.6.2, Available at www.chi.gov.uk/_db/_documents/Complaints_Toolkit.pdf

[101] The Medical Protection Society, *Guide to Resolving Complaints: The Wider Picture*, p.10. Available at www.medicalprotection.org/adx/aspx/adxGetMedia.aspx?DocID=23768,129,127,9698,22,11,Documents&MediaID=6657&Filename=MPS+Resolving+Complaints+booklet_web.pdf

[102] Relis (2009), p. 153.

[103] Similar to that used by the Scottish Legal Complaints Commission. See Section 3.1 of this report.

[104] See section 3 of this report.

2.4 Apologies

Apologies feature prominently in the complaints handling literature, as well as in the HPC's own research.[105] This section looks at the need for apology, how and where it can fit into complaints-handling procedures and its application to the HPC. While there is considerable discussion about the definition of apology, for present purposes a common-sense (and borrowed) definition is useful:

"an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate."[106]

2.4.1 Do complainants need an apology?

Harris and Riddell note some controversy about this:

"In terms of what people want, some might merely want an apology whereas some will want an authoritative decision; and some will want formal resolutions, while others have a preference for informal resolutions."[107]

However, other studies have found apology frequently featuring as both a goal and outcome of ADR programmes, suggesting it must have some importance to those involved. The HPC's own report on complainants' expectations lists apology as one of the hopes expressed for mediation.[108] Relis' study found that 94 per cent of medical negligence plaintiffs sought an admission of fault in mediation, with 88 per cent specifically wanting an apology.[109]

2.4.2 Why (not) apologise?

The apology appears to have suffered from the increase and (more significantly) the perceived increase in litigation,[110] insurance contract clauses and the associated fear of liability. Vines uses the term 'mischief' to describe the assumptions leading to the fear of, and therefore avoidance of, apologising. This has a "significant and unwelcome impact on civil society."[111] Vines summarises the impact as follows.

– We now live in a litigious compensation culture, a "culture of blame in which people no longer take responsibility for themselves".

[105] SPSO (2010), p. 12; Ipsos MORI (2010), p.21.

[106] British Columbia, Canada: Apology Act 2006 s.1.

[107] Harris, N, Riddell, S, and Smith, E, *Special Educational Needs (England) and Additional Support Needs (Scotland) Dispute Resolution Project Working Paper 1: LITERATURE REVIEW*, Centre for Research in Education, Inclusion and Diversity, University of Edinburgh, 2008, available from http://www.creid.ed.ac.uk/adr/index.html; See also *What do people want? From Transforming Public Services Complaints, Redress and Tribunals* (Department for Constitutional Affairs, 2004): "The outcome that people are looking for will vary considerably from case to case and person to person. A key question will be the extent to which people are looking (just) for a legal remedy, like an award of a disability benefit. Or whether they might really be seeking something else, like an apology or a clear explanation."

[108] Ipsos MORI (2010), p. 21.

[109] Relis (2008), p. 142.

[110] See Galanter, M, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' in *Journal of Empirical Legal Studies*, 1, 3, 2004, pp. 459–570. This highlights the stark contrast, in the USA at least, between public perception of a 'litigation explosion' and the reality of a steady decline in the number of trials.

[111] Vines, P, 'Apologies and civil liability in the UK: a view from elsewhere' in *Edinburgh Law Review*, 12, 2, 2008, pp. 200–30 at p. 204.

– Apologies amount to admissions, deemed to create liability by the courts and resulting in insurers having to pay claims.

– Apologies can still void an admissions / compromise clause in an insurance contract, rendering the person apologising liable without recourse to insurance.

– Apologising is seen as a mistake – "apologies are so prejudicial that they automatically tend to attract liability."

However, Vines also notes that apologies are a "social mechanism", with a "healing and re-balancing function for both victim and relationship, and often for the offender as well."[112] Apologies may thus have a corrective role in transferring the humiliation of harm from the harmed to the apologiser. Schneider describes this as the "exchange of shame and power".[113] In contrast, Jesson and Knapp present a more instrumental view of apologies, potentially robbing them of their sincerity and therefore value.[114] It is clear that not all apologies are the same, so we now turn to the question of their quality.

2.4.3 What makes a 'good' apology?

The General Dental Council's Principles of Complaints Handling includes the advice to "Offer an apology and a practical solution where appropriate. Remember that an apology does not mean you are admitting responsibility."[115] This somewhat contradictory advice suggests the making of a 'non-apology apology'. In Vines' view: "An apology does not exist unless the person who is expressing regret is also taking responsibility for a wrong which they have committed."[116] Anything less is only a 'partial apology' and there is some evidence that these are counter-productive, negatively affecting the complainant's view of the dispute.

The elements of disclosure, apology, lesson-sharing and implementing may be expressed without using the term apology. For example, the Australian Commission on Safety and Quality in Healthcare's 'Open Disclosure Standard' talks of:

– an expression of regret;

– a factual explanation of what happened;

– the potential consequences; and

– the steps being taken to manage the event and prevent recurrence.

[112] Vines (2008), p. 206.

[113] Schneider, C, 'What it Means to be Sorry: The Power of Apology in Mediation' in *Mediation Quarterly*, 17 (3), 2000. Available at www.mediationmatters.com/Resources/apology.htm

[114] Jesson, L and Knapp, P, 'My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors, and Medical Apologies' in *William Mitchell Law Review*, 35, 4, 2009, pp.1410–56 at p. 1421.

[115] www.gdc-uk.org/NR/rdonlyres/DC7DE443-B616-437E-B13B-0C014B9F5D73/0/ComplaintsHandling.pdf, p. 10.

[116] Vines, P, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?' in *Public Space: The Journal of Law and Social Justice*, 1.5, 2007, pp. 1–51 at p. 8.This article highlights the difficult overlap between a moral and legal wrong.

This standard provides a 40-page guide for what is essentially the mandated way to apologise in order to support the overarching aim:

"In working towards an environment that is as free as possible from adverse events, there is a need to move away from blaming individuals to focussing on establishing systems of organisational responsibility while at the same time maintaining professional accountability."[117]

The NHS's National Patient Safety Agency's 'Being Open: Saying sorry when things go wrong' guidelines offer similar advice:

"'Being open involves:

– acknowledging, apologising and explaining when things go wrong;

– conducting a thorough investigation into the incident and reassuring patients, their families and carers that lessons learned will help prevent the incident recurring;

– providing support for those involved to cope with the physical and psychological consequences of what happened."[118]

And finally, the NHS Education for Scotland (NES) practice note 'The Power of Apology' provides simple advice using 'three Rs':

– "Regret – Meaningful, real, acknowledge wrongdoing; Just say sorry; Accept responsibility

– Reason – Be honest – doesn't mean you will be sued; Unintentional and not personal; Trying hard to do the right thing

– Remedy – Next steps – who will do what; Investigate to find out why; Provide feedback"[119]

A number of countries have considered the potential of apologies in rectifying past wrongs. The National-Audit-Office-commissioned document, Handling Complaints in Health and Social Care: International Lessons for England,[120] looked at the healthcare regulatory regimes of ten countries including England. It found that approaches ranged from placing apology centre stage to no mention at all.

[117] www.health.gov.au/internet/safety/publishing.nsf/Content/ B892340AE79ACA88CA25775B00005B0F/$File/OD-Standard-2008.pdf; This is echoed in some US schemes for dealing with 'adverse events'. See, for example, Michigan University Health Service, as described in Boothman et al (2010); Kaiser Permanente's MedicOm scheme, described in Houk, C., and Edelstein, L. (2008) 'Beyond Apology to Early Non-Judicial Resolution: The MedicOm Program as a Patient Safety-Focused Alternative to Malpractice Litigation' in *Hamline Journal of Law and Public Policy*, 29, Fall 2007, pp. 411–22; See also Moody in www.roughnotes.com/rnmagazine/2005/november05/11p124.htm

[118] NHS National Patient Safety Agency, Being Open: Saying sorry when things go wrong, 2009. Available from the National Reporting and Learning Service at www.nrls.npsa.nhs.uk/EasySiteWeb/getresource.axd?AssetID=65172&type=full&servicetype=Attachment

[119] NHS Education for Scotland 'The Power of Apology' in Focus, Spring 2010, Available at www.nes.scot.nhs.uk/media/649655/apology%20spring%20focus%202010.pdf

[120] Lister, G, Rosleff, F, Boudioni, M, Dekkers, F, Jakubowski, E and Favelle, H, Handling Complaints in Health and Social Care: International Lessons for England, National Audit Office, 2008). Available at http://www.nao.org.uk/publications/0708/learning_from_complaints.aspx

2.4.4 The place of apology in ten healthcare regulatory regimes

(references are to Lister et al, 2008)

Northern Ireland	Local Resolution, followed by Independent Review and finally referral to an Ombudsman with apology encouraged, but fear of apology evident (pp. 5–6)
Scotland	In Health and Social Care Complaints apology more obviously encouraged, as part of redress and response to complaints (pp. 8 and 10)
Wales	Apology is similarly part of response and redress (p.12)
Australia	Open Disclosure standard and statutory exclusion of liability means apology is heavily encouraged and protected. Local Resolution, followed by referral to the complaints agency for assessment, investigation and / or further review, means ample opportunity for apology to come in (pp. 14–15)
Canada	Processes include mediation, giving space for apology with particular focus on explanation of lessons learned (pp. 17 and 19)
Denmark	Processes of aided local resolution followed by arbitration supports the opportunity for apology (pp. 20–22)
Germany	Fragmented system, so that "Apology is one outcome of complaint procedures that is difficult to achieve" (p. 25)
New Zealand	Outcomes from assessment and investigation include apology with focus of learning lessons from the incident (pp. 26–28)
The Netherlands	Complaints Committees with transparent hearings highlighting lessons that should be learned. Apology was not overly evident (pp. 29–31)

2.4.5 Apology in the HPC

The HPC's own approach to apologies is likely to influence the possibility of their occurrence. If panels view them as evidence against a professional (framing them as an admission of wrongdoing or poor practice) then the culture may work against apology even in a mediatory process. If, on the other hand, they look on professionals' apologies favourably (as illustrating that the registrant has shown insight into his or her part in the problem, explained it, apologised for it and recognised lessons that can be learned) apologies may be more readily offered. The HPC's Indicative Sanctions Policy is helpful:

"6. Even if a Panel has determined that fitness to practise is impaired, it is not obliged to impose a sanction. In appropriate cases, a Panel may decide not to take any further action, for example, in cases involving minor, isolated, lapses where the registrant has apologised, taken corrective action and fully understands the nature and effect of the lapse."[121]

This supports the possibility of full apology. An early face-to-face encounter, as in mediation, may also make an apology more likely to occur and be perceived as genuine.[122]

Recent hearings provide evidence of hearing committees' attitudes to apologies. For example, in a hearing for a radiographer, the lack of an apology was an aggravating factor in the sanction discussions: "the registrant has neither provided plausible explanation for the phone call nor offered any apology for the upset caused to Patient A."[123]

The case of a biomedical scientist indicated that panels can recognise partial apology and its limitations: "While the registrant has made a general type of apology, she has qualified this by stating 'she finds it difficult to apologise for something which she cannot remember'. The Panel find that this demonstrates a lack of insight into how inappropriate her conduct was about a professional colleague."[124]

A full apology by another radiographer was seen as a mitigating factor: "The Panel was satisfied that she has shown clear insight into these incidents, has expressed her regrets and has made an unqualified apology."[125]

[121] HPC Indicative Sanctions Policy, 2009. Available at www.hpc-uk.org/assets/documents/10000A9CPractice_Note_Sanctions.pdf

[122] SLCC's Marjorie Mantle believes a later apology is of less value: "If an apology hasn't been made by either party by then, I feel it would be unlikely to be genuine if made post-investigation", Mantle, 2010, p. 4.

[123] Monday 16 August 2010.

[124] Thursday 15 July 2010.

[125] Thursday 12 February 2009.

2.4.5 Conclusion

The National Patient Safety Authority states: "It is important to remember that saying sorry is not an admission of liability and is the right thing to do."[126] It may be helpful for the HPC similarly to recognise apology as a first element of local resolution. If, in response to a complaint, the registrant can acknowledge the harm caused, express regret and take steps to prevent it recurring, it is likely that a proportion of complainants will wish to take no further action. This corresponds closely to 'frontline resolution.'[127] It also chimes well with the HPC's existing emphasis on 'insight' as a key indicator of a registrant's capacity to address failings.[128]

2.5 Confidentiality and privilege

One of the perceived benefits of the mediation process is its confidential nature. Yet, despite often glib assertions by mediators, the issue of confidentiality and privilege is complex and uncertain.

The legal term 'privilege' refers to evidence that is not available for use in court proceedings, and applies to communications between lawyer and client. In Scotland there is no suggestion that this principle will apply to mediators,[129] while in England and Wales the question remains very much open.[130] However, it seems that the courts will treat mediation discussions as confidential in the same way as contractual negotiations, but subject to the same limited exceptions that apply to other 'without prejudice' negotiations.[131]

At the same time, recent case law from England and Wales suggests that mediation's confidentiality can no longer be assured. In order to tackle the perceived increase in the 'tactical' use of mediation some cases have ruled that where parties behave in an unreasonable fashion within mediation, thus stifling opportunities for settlement, evidence to this effect may be led in court to allow cost sanctions to be applied.[132]

[126] National Patient Safety Agency, *Being Open*, 2009. Available at www.nrls.npsa.nhs.uk/EasySiteWeb/getresource.axd?AssetID=65170&type=full&servicetype=Attachment

[127] See Section 4.2.1 below.

[128] HPC practice note on Disposal of Cases by Consent, p. 1.

[129] See the discussion in: Scottish Law Commission, *Discussion Paper No. 92*, 1991, paragraphs 1.3 and 2.1.

[130] Brown v Rice & Patel (ADR Group intervening) unreported, [2007] EWHC 625, per Deputy Judge Isaacs QC at para [20]. The limited evidence for such a common law principle led the Scottish Law Commission to propose statutory intervention in the area of family mediation, manifest in the Civil Evidence (Family Mediation) (Scotland) Act 1995.

[131] Including unequivocal admissions or statements made – see Cutts v Head 1984 Ch. 290; Daks Simpson Group Plc v Kuiper 1994 SLT 689 or where fraud, impropriety or misrepresentations in the negotiations are alleged – see Unilever v Proctor and Gamble [2001] 1 AE 783.

[132] Earl of Malmesbury v Strutt and Parker [2008] EWHC 424 (QB); Carleton v Strutt & Parker (A Partnership) [2008] EWHC 616 (QB). This view is consistent with Civil Procedure Rule 1.4(2)(f) which states that parties and their representatives must "ensure that their conduct within proceedings assists the court in furthering the overriding objective, or rather that aspect of it which require to court to help the parties settle the whole or part of their case."

Similarly, parties to mediation were ordered to disclose to the court certain documents furnished in the course of mediation discussions to allow the court to assess the level of damages in a subsequent case.[133] Finally, in the case of Brown v Patel[134] the court allowed evidence of parties' conduct at a mediation to ascertain if the case had settled or not.

These decisions represent something of an about face on the part of the judiciary: English judges in the past took the view that the court should not enquire into the reasons why mediation had failed.[135] There is a risk that rendering mediation more porous in this way will undermine parties' faith in the process.[136] The situation may be clarified shortly, however, as the recent European Directive on Mediation requires the UK to clarify its arrangements regarding the confidentiality of the mediation process.[137]

Given the current uncertainty regarding confidentiality, it may be helpful for the HPC to clarify the position with regard to mediation within the fitness to practise process.[138] This may require it to seek an extension of its statutory powers. Nonetheless, we consider there to be significant benefit from a clear statement by the HPC that the contents of a mediatory process shall be confidential. It would also be useful to clarify for registrants the HPC's attitude towards apologies.

[133] Cattley v Pollard 2007 Ch. 353.

[134] 2007 EWHC 625.

[135] Fusion Interactive v Venture Investment Placement [2005] EWHC 736.

[136] For a useful discussion see Wood, W., 'When Girls go Wild: The debate over mediation privilege' in online publication *The Mediator Magazine*. Available at www.themediatormagazine.co.uk/features/13-expert-briefings/46-mediation-privilege (accessed 30 August 2010).

[137] Directive 2008/52/EC, 2008 OJ L 136/3, article 7. This Directive places a number of obligations on member states to support cross-border mediation. These include taking measures to ensure: the quality of mediators, the enforceability of mediation outcomes and the confidentiality of mediation proceedings.

[138] See, for example, the Equalities Mediation Service's assurance about confidentiality: www.equalities-mediation.org.uk/faq/#24

3 Comparative perspectives

Here we consider a range of models. The HPC hoped to find rigorous evaluations of the use of ADR in the regulation of health professionals. Looking around the world these seem rather rare.[139] We have therefore expanded this review to include both parallel processes; the use of ADR in other settings, and in parallel subject areas (ie other facets of complaints-handling in healthcare). The ADR literature contains considerably more description than evaluation and we have referred to these studies where appropriate. We also echo Menkel-Meadow's recent note of caution when she identified four difficulties in assessing empirical studies of ADR processes:

- lack of clarity about what each process actually is;
- problems in developing comparable cases;
- the virtual impossibility of using true experimental design where the same dispute is subject to different conditions; and
- "the continually changing and open nature of the field itself (through innovations, hybridization and locations in different legal systems and cultures)".[140]

Subject to these caveats, we describe below some of the settings where ADR has been embraced.

3.1 Scottish Legal Complaints Commission

Disquiet with self-regulation by the Scottish legal profession led to the setting up of the Scottish Legal Complaints Commission (SLCC).[141] Something of a half-way house, SLCC acts as the gateway for all complaints about legal practitioners while the relevant professional bodies retain disciplinary responsibility for professional misconduct.[142] Its first stage involves sifting the complaints and rejecting those that are frivolous, vexatious or late.

Its second step involves a further sift. One of the scheme's innovations is to subdivide complaints into two types, each pursuing a different route. 'Service' complaints relate to "the quality of work a practitioner has carried out, or which you think should have been carried out, during the course of a transaction".[143] 'Conduct' complaints concern "a practitioner's behaviour, their fitness to carry out work and how they have behaved either in carrying out a transaction or outside of business."[144]

[139] Linguistic limitations on the part of the researchers have contributed to a strong focus on English-speaking and European examples. There may be examples from further afield of which we are unaware.

[140] Menkel-Meadow, C, 'Empirical Studies of ADR: The Baseline Problem of What ADR is and What It is Compared to' in Cane, P, and Kritzer, H (eds.) *Oxford Handbook of Empirical Legal Studies* (forthcoming 2010 at time of writing), p. 2.

[141] Legal Profession and Legal Aid (Scotland) Act 2007.

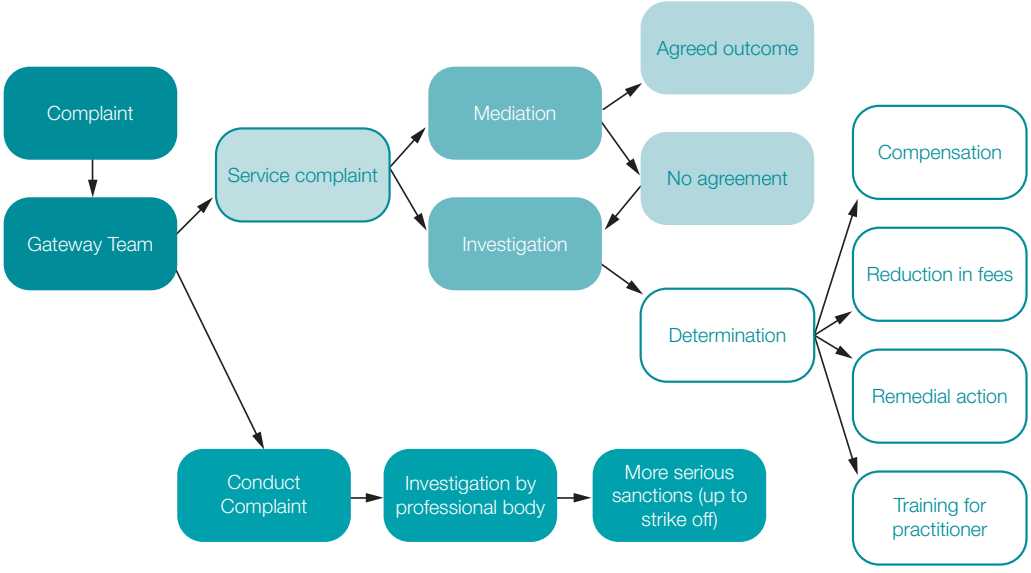
[142] The Law Society of Scotland and the Faculty of Advocates.

[143] www.scottishlegalcomplaints.com/how-to-complain.aspx#Service%20Complaint See also the Law Society of Scotland's definition: "the service a client can expect from a firm of solicitors or an individual solicitor. Typically these include service issues such as delivering on commitments and using clear language to communicate." From the Standards for Scottish Solicitors, available at www.lawscot.org.uk

[144] *Ibid*. The Law Society's definition refers to "the behaviour of the individual solicitor. These include acting with integrity and honesty and not working for two or more clients where there is a conflict between those clients".

The 'Gateway Team' thus plays a critical role in dealing with complainants and in signposting the mediation scheme.[145] If a complaint is deemed to concern 'conduct' SLCC has little further involvement and an investigation is carried out by the relevant professional body. However, for complaints about 'service', SLCC offers both mediation and investigation. The process is illustrated in the diagram below.

Figure 2 – Complaints Process: Scottish Legal Complaints Commission



Prior to formal investigation, both complainants and practitioners are offered the option of mediation. The motivation for this was to encourage local resolution of complaints while preventing matters that could be resolved from going on to formal investigation.[146] The Act also created the position of Client Relations Partner within solicitors' firms to strengthen and improve internal complaints procedures.

While not a health regulator, SLCC is one of the few bodies across the Western world to have made mediation a **default** step in its complaints process. And although it only came into being on 1 October 2008, it has begun publishing statistics on the uptake and effectiveness of mediation. We therefore conducted a face-to-face interview with its Mediation Manager, Marjorie Mantle.[147]

[145] Similar to the 'triage' idea suggested at Section 2.3.3 above.

[146] Scottish Executive, *Reforming complaints handling, Building consumer confidence: Regulation of the Legal Profession in Scotland*, 2005. Available at www.scotland.gov.uk/Publications/2005/05/09103027/30369 .

[147] Reproduced in full in the appendix to this Report, cited as Mantle, 2010.

Mantle raises a number of issues of importance to the HPC. The first is of great practical significance: how to ensure that mediation is used or at least considered with an open mind by both or all parties. This is an issue that has dogged the ADR movement since the revival of interest in mediation in the 1970s.[148] SLCC's own statistics tell a typical story. Participants tend to hold very positive views once they have experienced mediation[149] and yet a large proportion reject it.[150] Mantle stresses the importance of the coordinator role in addressing this issue: "This is not just a matter of sending out letters, but of conveying the values of mediation, particularly to the Client Relations Partners. Of course I also have to convey that even-handedness to the complainers."[151] She also tells of a slow start, followed by a more recent increase as the legal profession comes to believe that mediation is even-handed, or perhaps simply gets used to the idea. However, she acknowledges that the bulk of her promotional efforts have been targeted at the legal practitioners, in spite of the fact that it is complainants who reject mediation in higher numbers, citing the simple impracticality of educating all of the public. It is possible that the HPC is better placed to accomplish the latter task given its size and profile.

A second, related, issue concerns complainants' motivations. In contrast to some findings from the health and education sectors,[152] Mantle believes that a majority of those who complain about legal practitioners "want the solicitor 'punished'. A minority want the problem solved with the minimum of fuss."[153] It might be expected that mediation would disappoint this group, but Mantle was upbeat about its effects: "However, and this is the benefit of mediation, when face to face with the person they wanted to 'beat up' they realise that this is just another person."[154] The key phrase 'face-to-face' runs like a thread through the literature we reviewed.[155] This suggests that, even where people enter a complaints process with little expectation or desire for reconciliation, the force of a direct encounter with the other person should not be underestimated.

[148] See the consideration of 'Benign neglect' at Section 4.3 below.

[149] 31 out of 34 respondents said they would recommend mediation to others, and 26 rated it as excellent (15) or very good (11). See Mantle, 2010.

[150] Out of 141 cases where mediation was suggested, it had been rejected in 98 (by both parties – 8; by practitioner – 28; by complainant – 62). See Mantle, 2010.

[151] *Ibid*.

[152] Harris and others, cites both Genn (1999) and Gulland (2007) in asserting that "people simply wanted to solve the problem rather than secure any punishment, revenge or an apology and so they wanted routes to redress that were quick, cheap and stress-free", Harris and others (2008), p.33.

[153] Mantle, 2010.

[154] *Ibid*.

[155] See Section 2.3.2 above. In one US scheme 'face-to-face meeting' was listed as a form of ADR, see Szmania, S, Johnson, A and Mulligan, M, 'Alternative Dispute Resolution in Medical Malpractice: A Survey of Emerging Trends and Practices' in *Conflict Resolution Quarterly*, 26, 2008, pp. 71– 96 at p. 73; see also Moody, M, (2005) www.roughnotes.com/rnmagazine/2005/november05/11p124.htm

A third insight from Mantle concerned speed. In her view mediation works best when the face-to-face encounter happens relatively quickly after the events leading to the complaint. This would confirm conventional wisdom that sees a mediatory approach as a first and early step in a complaints resolution process.

Finally, Mantle discusses the success of mediations. Settlement was achieved in 21 out of 35 cases (60%). When asked what forces might work against settlement she speculated on the lack of a 'down side' for the complainant. While the costs to legal practitioners increase the further into the investigation process they go, there is no cost to complainants. If their goal is punishment there is little incentive to resolve matters at mediation. Charging complainants for an unsuccessful investigation may modify this effect, but could have the unwelcome consequences of dissuading complainants with a valid complaint and limited resources.

This touches on the goals of a mediatory approach. It seems well suited to allow the following to take place: explanation, apology, a chance to talk about the impact of the event and plans to prevent its recurrence.[156] However, when outcomes are framed in more instrumental terms, such as diversion or settlement, it can look less successful. It is therefore important to resolve in advance the criteria by which a mediation scheme will be judged.

The above outcomes may be particular to complaints against lawyers,[157] with their understandable focus on adversarialism and monetary outcomes. The HPC's fitness to practise process focuses on the registrant's "health and character, as well as the necessary skills and knowledge, to do their job safely and effectively".[158] Such matters can be discussed in a mediation process, but the list highlights the potential importance of having a representative of the HPC present to ensure that the public interest is protected in any agreements that are made. It should be noted that SLCC's scheme, with its distinction between 'service' and 'conduct' complaints, does not provide an exact comparison with the HPC.

The SLCC scheme raised some useful questions for the HPC.

- Could there be some equivalent for the HPC of the distinction between 'service' and 'conduct' complaints?
- Would the HPC wish to reserve mediation for less serious matters? What would be the benefits and disadvantages?
- What is the most useful point in the fitness to practise process for mediation to take place?
- If the HPC favours a mediatory approach, how can it ensure that this option is properly considered by both complainants and registrants, as in the SLCC model?

[156] Szmania et al, 2008, p. 73.

[157] See Relis, T, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge: Cambridge University Press, 2008).

[158] *Health Professions Council Fitness to Practise Annual Report 2009*, p. 4.

3.2 Disciplinary processes for other UK professions

It is also helpful to consider other UK professions. ADR is rather rare in dealing with complaints against members, with most adopting more traditional disciplinary proceedings following breaches of a code of conduct. Some examples are described below.

The Chartered Institution of Building Services Engineers'[159] complaints procedure focuses on their code of conduct. A disciplinary panel determines whether there is a cause for sanction, with the power to censure, suspend or expel its members.

The Chartered Institute of Arbitrators[160] focuses strictly on misconduct. Complaints in the first instance are made to the legal department, which then offers the practitioner an opportunity to comment before the Professional Conduct Committee adjudicates.

The Institute of Chartered Accountants in England and Wales (ICAEW)[161] has embraced ADR as part of the process when the "professional and ethical standards of our members and firms do not meet the reasonable expectations of the public and other members." Complainant led local resolution is preferred as a first stage, with the ICAEW stepping in where this fails. Cases are sorted initially, with 60 per cent proceeding. Cases closed at this stage mostly seem to be fee disputes, for which a voluntary arbitration scheme is suggested. If a case is not a disciplinary matter, the ICAEW will suggest independent mediation or, again, arbitration. Disciplinary cases are dealt with in one of two ways. Conciliation is offered where the firm or member could do something to address the complaint, ie return withheld records. If unsuccessful or rejected, an investigation allows the ICAEW to take disciplinary action itself.

The Civil Mediation Council's Complaints Resolution Service[162] is, perhaps unsurprisingly, based on informal mediation by the member him / herself. If this fails, the matter may be referred to the CMC for resolution by mediation.

The General Medical Council's (GMC) complaints resolution procedure strictly follows the fitness to practise model.[163] There is a preference for first contact to be locally made, but if this is unsuccessful the complaint may be escalated by approaching the GMC. Cases are screened to determine if they are relevant to fitness to practise then, if considered serious enough for a hearing, adjudication is made.

[159] www.cibse.org/index.cfm?go=page.view&item=1058

[160] www.ciarb.org/information-and-resources/membership-rules-and-regulations/how-to-make-a-complaint/

[161] www.icaew.com/index.cfm/route/139178/icaew_ga/en/Home/Protecting_the_public/Complaints_process/Complaints_process

[162] www.civilmediation.org/page.php?page=2

[163] www.icaew.com/index.cfm/route/139178/icaew_ga/en/Home/Protecting_the_public/Complaints_process/Complaints_process

3.3 USA

The USA has one of the most developed ADR sectors in the world.[164] Since coming to prominence in the 1970s ADR, and in particular mediation, is being used in numerous settings such as family, neighbourhood, employment, environmental disputes, education, business and civil court.[165] A recent survey found that 140 out of 151 US law schools offered courses in ADR.[166] And in 2008 Relis could say that lawyers in America were "at an advanced stage of acceptance of mediation per se during formal legal processes".[167]

Medical malpractice has provided ripe territory for the use of ADR, and we review a number of schemes. When it comes to the regulation of professionals, however, we were unable to locate any US reference to the use of mediation. Litigation is the default way to hold healthcare professionals accountable. This has one advantage for our study: improvements brought about by the introduction of ADR schemes are readily measurable in terms of litigation rates or settlement rates. While it might be thought that these schemes would focus largely on fault and financial liability, organisations also stress the contribution of an ADR approach to improving patient safety through systemic quality improvement. For example:

"Saving litigation costs was a side-effect rather than a motivating cause for Kaiser Permanente's leadership [...] the program was put in place [...] to help ensure that their members' quality-of-care concerns are addressed in a timely, empathetic and honest manner."[168]

Szmania et al[169] studied a number of organisations offering medical malpractice ADR. They found a broad range of ADR processes in use, most frequent being "opportunity to tell one's story", followed by facilitating apologies, facilitating explanations, mediation, assurances that the error would not happen again and face-to-face interaction.[170] Typical ADR programme goals were: early intervention, diffusion of anger, reduction in costs, untangling entrenched positions, preserving doctor-patient relationships and 'early settlement'.[171] Most frequent outcomes included explanation and apology, with monetary settlement somewhat less common.

[164] Although China claims to have 4.9 million mediators. Chinese Ministry of Justice (http://english.sina.com/china/2010/0828/336569.html)

[165] For a review of the field see Jones (ed.) 'Conflict Resolution in the Field: Assessing the Past, Charting the Future' in *Conflict Resolution Quarterly*, 22 (1&2), 2004.

[166] Lande, J, and Sternlight, J, 'The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering' in *Ohio State Journal on Dispute Resolution*, 24 , 2010, pp. 249–96, note 101.

[167] Relis (2008), p. 82.

[168] Houk and Edelstein (2008) p. 422; See also Dauer and Marcus, E, (1997) 'Adapting Mediation to Link Resolution of Medical Malpractice Dispute with Health Care Quality Improvement' in *Law and Contemporary Problems*, 60, pp. 185–218; Szmania and others (2008); Boothman and others (2009).

[169] Szmania and others (2008).

[170] *Ibid,* p. 79.

[171] *Ibid*, p. 79.

The success rate of the schemes was around 90 per cent.[172] The authors made a comparison between medical malpractice ADR and victim-offender mediation,[173] suggesting that in both settings victims can find a way to gain control of their vulnerability. Significant cost savings were also noted when hospitals introduced an "interest-based, collaborative approach to claims management" with one reporting savings of $52,000 per case.[174]

Boothman et al studied one institution's efforts to manage the apparently inexorable rise in medical malpractice claims. The University of Michigan Health Service sets out to deal with potential claims by being transparent with patients and their families, apologising immediately if fault clearly lay with the healthcare team, always offering an explanation while robustly defending 'medically reasonable' decisions. Every potential claim is reviewed by an experienced member of staff. While not strictly speaking a form of ADR, the scheme does provide evidence that an open, transparent approach to complainants can pay dividends: from 2002 to 2007 the number of open claims dropped from 220 to 83, the average claim processing time had dropped from 20.3 months to under eight and litigation costs had halved.[175] The study also reports significant medical improvements as a result of the scheme, hypothesising that a move away from 'defend and deny' allowed hospitals to understand and act on insights from unexpected incidents.

The USA Medicare system had an annual budget of $486 billion in 2009.[176] A substantial quality improvement programme was initiated in 2004[177] and one of its innovations was to enable Quality Improvement Organizations (QIO's) to offer mediation in place of the traditional review process.[178] In proposing the use of mediation in Medicare one writer suggested it would rest upon a "basic assumption of patient competency and personal power."[179] In common with a number of mediation schemes, there is a preliminary sift so that the more serious matters go straight to investigation. Those designated "no substantial improvement opportunities identified" or "the care could reasonably have been expected to be better" can go on to mediation.[180] The process is outlined over the page.

[172] *Ibid*, p. 81.

[173] Now known in the UK as restorative justice; see Section 4.2.5 below.

[174] Szmania and others (2008), p. 77.

[175] Boothman and others (2009), p. 144.

[176] President's Fiscal Year CMS 2009 Budget Request. Available at www.hhs.gov/asl/testify/2008/02/t20080214a.html

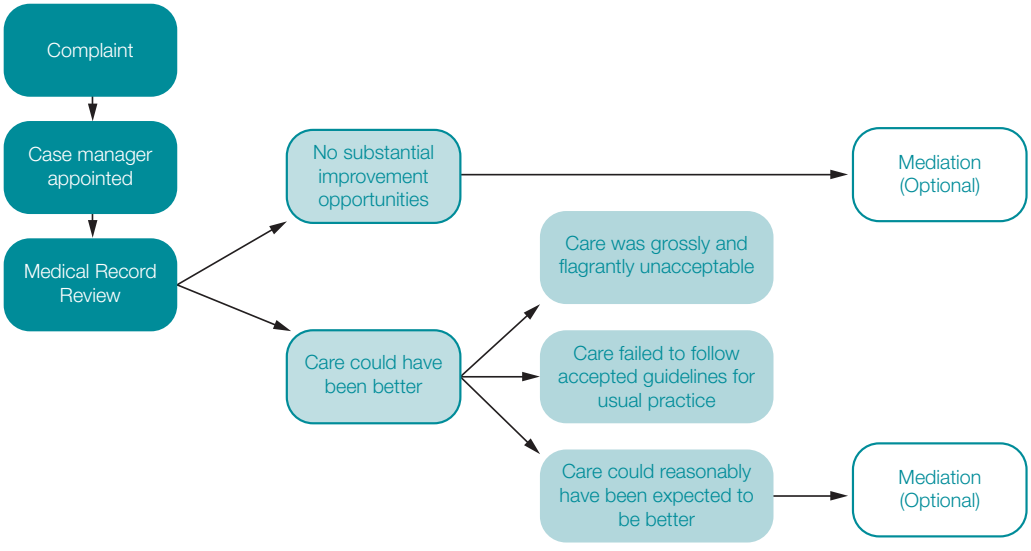
[177] *Medicare's Quality Improvement Organization Program: Maximizing Potential (Series: Pathways to Quality Health Care)*, 2006. Available from www.nap.edu/catalog/11604.html

[178] *Ibid*, p. 308.

[179] Bernard, P 'Mediating with an 800 pound gorilla' in *Washington and Lee Law Review*, 60, 2003, pp. 1417–59 at p. 1450.

[180] *Medicare's Quality Improvement Organization Program* (see note 177), p. 308. See also *Mediation: A New Option for Medicare Beneficiaries Available* from www.cms.gov/BeneComplaintRespProg/Downloads/3a.pdf

Figure 3 – Complaints process for Medicare beneficiaries



Although mediation was not evaluated separately from changes to the overall case review programme (which now includes a mediation step), taken as a whole, user-satisfaction with the outcome of a case review had gone from 39 per cent to 60 per cent in the course of one year.[181]

A number of private insurers have also incorporated mediation into their complaints processes, most notably Kaiser Permanente (KP).[182] KP is a not-for-profit healthcare organisation, providing hospitals, physicians and health insurance, and its preferred model has been to appoint 'medical ombudsman / mediators'.

As the title suggests, these full-time employees have a role in dealing with difficulties as soon as an 'adverse event' occurs, sometimes meeting patients and their families the same day. They can spend several weeks preparing for a mediation and when it occurs they have a mandate to include a wide range of parties including physicians, hospital administrators, risk managers and insurers as well as patients and their families. If a mistake has been made compensation will be offered, but the emphasis is very much on continuous improvement, incorporating lessons learned into future provision.[183]

[181] *Ibid*, p. 320. The survey compared the traditional case review system with a new system which included a mediation option. From April 2003 to July 2004, there were 3,378 beneficiary complaint cases, of which 357 entered the mediation process.

[182] Houkand Edelstein (2008).

[183] Private conversation with Lois Kaye, medical ombudsman / mediator with Kaiser Permanente in Oakland, CA, on 4 September 2010.

The 'medical ombudsman / mediator' has much to commend it. However, its focus on wider systemic learning may render it less applicable in the HPC context, where the principal focus is on individual registrants' competence.

3.4 UK clergy discipline provisions

Both the Church of England and the UK Methodist Church have inserted a mediatory step into their disciplinary process, with a particular emphasis on the importance of restoring the pastoral relationship.

3.4.1 Church of England

The Church of England's Clergy Discipline Measure 2003[184] applies only to those 'Allegations of Misconduct' about:

- doing any act in contravention of or failing to do any act required by the laws ecclesiastical;
- neglect or inefficiency in the performance of the duties of the office; or
- conduct unbecoming or inappropriate to the office.[185]

The overall purpose of the measures is to "deal with clergy who are found to have fallen below the very high standards required and expected of them."[186]

In common with most schemes there is an initial scrutiny of complaints, carried out by the registrar on behalf of the Bishop to whom the complaint was sent. Once the complaint has been accepted 'conciliation' is among the actions open to the Bishop.

The reasons given for choosing conciliation are: "to restore the pastoral or personal relationship between the clergy and complainant", and that "the complainant seeks an apology." [187]

Conciliation is not used for any complaint which, if proved, would require a penalty of prohibition. Any agreement that is made during the conciliation must be later ratified by the Bishop, and this can only be done if the agreement suggested is within his powers as laid out by the Measure.[188] If conciliation is unsuccessful, there is an investigation process, then a tribunal, which makes a determination. If the tribunal finds there has been misconduct it may impose a prohibition for life, a suspension, removal from office, revocation of license, an injunction or rebuke.

3.4.2 Methodist Church

The "imperfect nature of human beings" as part of the Methodist Church's "fallible community" requires there to be a robust complaints procedure.[189]

[184] www.cofe.anglican.org/about/churchlawlegis/clergydiscipline

[185] S.8 Clergy Discipline Measure 2003.

[186] Church of England Clergy Discipline Measure 2003 Code of Practice, paragraph 4. Available at www.cofe.anglican.org/about/churchlawlegis/clergydiscipline/codeofpractice.pdf

[187] *Ibid*, paragraph 127.

[188] *Ibid*, paragraph137.

[189] Bellamy, C, *Complaints and Discipline in the Methodist Church: A Step by Step Guide to the Standing Orders on Complaints and Discipline [3rd Edition]*, 2008. Available at www.methodist.org.uk/downloads/cd-guide-to-complaints-and-discipline-bellamy-091208.pdf

The initial sorting stage is: "a critical appraisal of the significance of the relationship between the standing of the person complained of in relation to the Church and the words, acts or omissions complained of." Complaints may be made about any member of the Methodist Church.

The first stage encourages local, informal resolution, by "whatever steps are appropriate"' including mediated settlement.[190] This is done in all except sufficiently serious cases, which go directly to the Connexional Complaints Panel. The second stage is described as being 'formal resolution'. If neither informal nor formal resolution is successful the complaint goes to the Connexional Complaints Panel. A disciplinary hearing may be called for serious breaches of discipline, disregard to the church or if they "have or might have seriously impaired the mission, witness or integrity of the Church by his or her words, acts or omissions."[191] There are many disposals and penalties available, ranging from expulsion to a rebuke. Mediation may be used as part of the reconciliation process, as with the Church of England measures, when personal or pastoral relationships are at issue.

3.5 The Netherlands

The Dutch Individual Health Care Professions Act (Wet BIG)[192] regulates the provision of care by dentists, doctors, healthcare psychologists, midwives, nurses, pharmacists, physiotherapists and psychotherapists. The aim of the Act was to replace an ineffectual statutory regime and provide greater scrutiny of the medical professions. It was also intended to strengthen the position of complainants, as there had been a perception that the previous regime had enabled professionals to protect one another.[193] This in turn required additional safeguards, with the over-riding purpose of the Act to "foster and monitor high standards of professional practice and to protect the patient against professional carelessness and incompetence."[194]

The complaints process under this Act has two streams: disciplinary measures and fitness to practise measures. Disciplinary measures aim to "guarantee proper standards of professional practice in order to protect the interests of those for whom care is provided."[195] Two norms apply: 'due care', and all other activities which conflict with proper practice.

[190] *Ibid*, paragraph 2.6.

[191] *Ibid*, paragraph 5.3.

[192] Ministerie van Volksgezondheid, Welzijn en Sport (Ministry of Health, Welfare and Sport, the Netherlands), *The Individual Health Care Professions Act International Publication Series (number 10)*, The Hague, October 2001, pp. 1–69. Available from http://english.minvws.nl/includes/dl/openbestand.asp?File=/images/big-eng_tcm20-107817.pdf

[193] Hout, E, The Dutch disciplinary system for health care: an empirical study, 2006, p. 9. Available from http://dare.ubvu.vu.nl/bitstream/1871/9194/1/binnenwerk_proefschrift_Hout.pdf This thesis pays particular attention to the application of a professional disciplinary regime (already applied to the 'old professions' of medicine, dentistry and pharmacy) to the 'new professions' of psychology, physiotherapy and nursing.

[194] *Ibid*, p. 5.

[195] *Ibid*, p. 10.

Complaints may be brought by patients, their relatives or other professionals. The Public Health Inspector may also institute proceedings. Following a written complaint, a preliminary investigation takes place. At this stage, both parties are given an opportunity to state their views, and an "amicable agreement" is offered.[196] If accepted, this is recorded and implemented and the disciplinary process is terminated. If not, the complaint continues to a hearing. Sanctions range from a warning, reprimand, fine, suspension or conditions on practice, to striking off.

Fitness to practise means literal fitness: cases cover only unfitness as the result of a mental and / or physical condition or of habitual misuse of alcohol or drugs.[197] Only the Public Health Inspector may bring such a case and a board will assess the practitioner's fitness with possible sanctions including putting conditions on practice or striking off. There are, in addition, penal provisions under the act, all of which would be otherwise covered by criminal law.[198]

The division of case types mirrors that of the HPC, with the Dutch Fitness to Practise cases running in line with those that go to the HPC's Health Committee. While the disciplinary scheme covers most other issues, by bracketing norms of due care and "against proper practice" it excludes some 'consumer-type' complaints.

The opportunity for "amicable agreement" is an interesting variant on ADR, but like a number of innovations in this field there is little evidence of its use.[199] While the methodology is not mentioned, it could work as mediation or simply as a third-party proposed agreement which the parties are free to reject.

There has been some criticism of the scheme. A further legally qualified person was added to the five-person disciplinary boards with the intention of strengthening the position of complainants, but in fact the number of complaints upheld has reduced.[200] Professionals were also critical where the panel did not contain someone from the same profession.[201]

3.6 France

The French Médiateur de la République (MDLR) fulfils a similar role to an ombudsman in other countries, helping citizens in their disputes with the state and administration. In 2009, following almost 40 years' experience since the post was established in 1973, the Médiateur declared that: "We no longer have to manage a case but accompany a person to help him overcome a problem. Receiving is respecting, accompanying and reconstructing."[202]

196 *Ibid*, p. 11.

197 *Ibid*, p. 12.

198 *Ibid*, p. 13.

199 An evaluation of the disciplinary system makes no mention of amicable settlement occurring in its 180 pages – Hout (2006).

200 From 19 per cent to 15 per cent, *Ibid*, p. 130.

201 *Ibid*, p. 130.

202 Mediator of the French Republic, Annual Report 2009, www.mediateur-republique.fr/fic_bdd/pdf_fr_fichier/1271756115_Rapport_2009_ANGLAIS.pdf

This seems to suggest a parallel with the HPC's work. The role of 'accompanying' could conceivably included a face-to-face mediatory meeting with the practitioner, modelling the three pillars of procedural justice described above – a chance to tell one's story, a sense that this is being taken into account and respectful treatment by a representative of authority.

The MDLR has now extended his role into the healthcare sector following the recognition that, even though the complaints system may be effective, those making complaints often experience a sense of powerlessness. He also identifies benefits for the healthcare system: "Physical mediation, in particular, has an educational value for professionals: it does not seek to hold somebody responsible, but to use the error positively".[203] This highlights a difficulty for mediation: does it run counter to the idea of 'holding somebody responsible'? If so, it will be difficult for a regulator representing the public interest to countenance. In the case of the HPC, the mediatory step would need to combine the ideas of accountability and learning from mistakes. The MDLR notes a rise in the phenomenon of dissatisfied complainants going on to raise court actions against medical practitioners. Acknowledging that this is part of an international trend, he suggests that it "maintains and escalates deadlock situations".[204]

Finally, he raises the issue of what he terms 'ordinary maltreatment' in hospitals. This includes poor hygiene and insufficient attention to the patient's pain or other characteristics, and may often stem from factors beyond the control of the practitioner. The MDLR acknowledges that health practitioners are under pressure and may become the object of insults and even violence. One in five health related referrals come from the practitioners themselves and therefore his role is also to "take care of the healthcare workers, without criticising them, and to strive, together with them, for a 'good-treatment' policy".[205]

The example of the MDLR suggests that the HPC may wish to consider 'mediators with power'.[206] This term was coined by US mediation writer Bernard Mayer, who asserts that mediation's credibility can be enhanced when conducted by someone who commands high respect and authority within society. It may be that in the UK too complainants and practitioners could find mediation more acceptable if it were provided by such a figure (for example the Health Service Ombudsman).[207]

[203] *Ibid*, p. 6.

[204] *Ibid*, p. 6.

[205] *Ibid*, p. 7.

[206] Mayer, B, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (San Francisco: Jossey-Bass, 2004), pp. 108–110.

[207] However, Kaiser Permanente in the USA see it as more important for the ombudsmen / mediators to be health professionals (private conversation with Carol Houk, founder of the Kaiser Permanente MedicOm scheme, on 11 September 2010).

3.7 Belgium

In August 2002 Belgium passed a law creating a mediation function within the health service. Its purpose is to "prevent queries and complaints through the promotion of communication between patient and professional practitioner.[208] The Act also sets out a general standard for health professionals: "Everyone should receive from the health professionals the most appropriate care to prevent, listen, evaluate, consider, process and relieve pain."[209]

The scheme seems to have had positive results, with the most common subject matter being the therapeutic regime. However, the technical details mattered much less than the poor quality of the patient / carer relationship. By 2008 the scheme was still "too little known".[210] As noted below,[211] Delvaux found that the scheme was completely invisible in hospital leaflets.

In 2008 the Belgian Fondation du Roi Baudoin published a study of hospital mediation schemes in seven countries: Canada (Quebec), Finland, France, Germany, the Netherlands, Norway and the United Kingdom. Its findings were as follows.

- Some countries gave frontline complaint handling to general managers, others to mediators; two combined the two approaches; four countries provided support to patients in bringing complaints.
- Mediators tended not to have senior positions in the hospital hierarchy; if they were non-medical, they tended to be full-time mediators.
- While there was not unanimity about the appropriate qualifications for mediators, there was a strong emphasis on continuing professional development. In the future it is likely that some sort of benchmark standard will develop.
- Six of the seven countries allowed access to medical records.
- Six of the seven integrated complaints handling into the quality system of their local hospital. The UK was the only one to integrate local complaint and litigation management into its national risk management strategy.

Interestingly the author found that, overall, the UK's system was strongest, taking account of common-sense values and integrating complaints-handling into a systematic and dynamic vision of healthcare.[212]

[208] Law of 2 August 2002, Article 11 § 2 See www.ordomedic.be/fr/avis/conseil/la-fonction-de-m%E9diation

[209] *Ibid*, Article 11a.

[210] Delvaux (2008).

[211] At Section 4.3.

[212] Jacquerye, A., *Exploratory study of hospital mediation* (Fondation Roi Baudoin, 2008). See www.kbs-frb.be/uploadedFiles/KBS-FRB/05)_Pictures,_documents_and_external_sites/14)_Summary_publications/MediationHospitaliere_Resume_FR.pdf

3.8 Alberta, Canada

Mediation and other alternatives to formal complaints processes are being used in a number of jurisdictions, and the term 'Alternative Complaint Process' (ACP) has been coined.[213] The Alberta Health Professions Act 2000 covers 28 health professions.[214] The Act creates, for each profession, a college to govern and regulate its members. The focus is on protecting and serving members of the public and includes enforcement and regulation of a standard of practice and ethics. Only complaints about professional conduct may be considered.

Complaints are made in writing to the Complaints Director who has eight options for action, as follows.

- Encourage parties to communicate and resolve the complaint.
- Attempt to resolve the complaint with the parties' consent.
- Make a referral to the 'Alternative Complaint Process'(ACP).
- Request an expert to provide an evaluation of the subject-matter of the complaint.
- Investigate the complaint.
- Dismiss the complaint if vexatious or trivial.
- Dismiss the complaint if there is insufficient or no evidence of unprofessional conduct.
- Make an incapacity order on grounds of mental or physical health (includes a treatment order and / or suspension).[215]

ACP can only go ahead with the agreement of both complainant and professional. The person conducting the ACP must be impartial, and act impartially. A member of the professional's college must conduct or participate in the ACP. While mediation is not referred to by name, the function of the person conducting the ACP is to assist in settling the complaint. Any settlement reached must be reported to the complaints review committee to be ratified, amended (with consent of both parties) or refused. In these two requirements the scheme shows both norm educating and norm advocating characteristics.[216]

If ACP does not achieve settlement, the complaint will return to the Complaints Director. An investigation is likely to follow, then a re-investigation or hearing if the complainant does not agree with a dismissal of the complaint. The hearing can make a wide-range of orders including: caution, reprimand, impose conditions, make a treatment order, suspend or cancel registration, or order to pay costs or fines.

[213] Province of Alberta, Canada: Health Professions Act 2000, SS 58–60 (www.qp.alberta.ca).

[214] Acupuncturists; chiropractors; combined laboratory and X-ray technicians; dental assistants; dental hygienists; dental technologists; dentists and denturists; hearing aid practitioners; licensed practical nurses; medical laboratory technologists; medical diagnostic and therapeutic technologists; midwives; naturopaths; occupational therapists; opticians; optometrists; paramedics; pharmacists; physical therapists; physicians, surgeons and osteopaths; psychologists; registered dietitians and registered nutritionists; registered nurses; registered psychiatric and mental deficiency nurses; respiratory therapists; social workers; and speech-language pathologists and audiologists. See schedules 1–28 of the HPA 2000.

[215] HPA 2000, S.55(2).

[216] See Section 1.3 above.

4 Observations for the HPC

4.1 ADR – what are its goals?

It is clear that ADR schemes are diverse and motivated by varied considerations. A key question for the HPC concerns purpose: what could an ADR scheme deliver that the current fitness to practise process does not? If this question does not have a clear affirmative answer then it is unlikely that a mediation scheme will be used, however well-intentioned.[217] This links to the related question of beneficiaries. Would such a scheme benefit complainants (whether members of the public or not), registrants, the HPC in its public protection role, the health service or the wider public? We set out below some of the possibilities and their implications.

4.1.1 Diversion

One of the key drivers for the growth of ADR has been dissatisfaction with existing dispute-resolution processes. This may be because they are slow, expensive and inaccessible, or to free-up formal adjudication for more serious cases. Previous research for the HPC has indicated some misunderstanding of the existing fitness to practise process on the part of members of the public who complain, leading to possible dissatisfaction.[218] However, this does not in itself make the case for diversion. The HPC has a duty to protect the public and we see no indication that, for example, cost savings are a motivation for introducing ADR.

On the other hand, the investigation process requires an investment of time and resources from both the HPC and the registrant and one of the respondents in the Ipsos MORI research thought mediation could resolve matters more speedily.[219] It may also be that a number of complaints concern matters not pertaining to fitness to practise: a mediation meeting may allow these to be resolved to the satisfaction of the parties without involving other agencies.

4.1.2 'Reinstatement of the care relationship'

This term comes from an evaluation of the Dutch regulatory system.[220] It highlights one of the claims consistently made for mediation: that it can enable parties to resolve disputes without terminating their relationship. While a complaint to the HPC may indicate that the care relationship is already fatally damaged, for a proportion of complainants a continuing or improved relationship with a valued carer will be important. Some may have complained because it is the only way they can highlight a difficult issue, or because they have been advised to do so. If a mediation meeting were to be offered early in the fitness to practise process it would present an opportunity to address such concerns while allowing the professional relationship to continue (and perhaps strengthening it).

[217] See Section 4.3 below.

[218] Ipsos MORI (2009), p. 12: "Attempting to resolve problems can be stressful and a lack of common understanding of the complaints procedure can be a source of dissatisfaction among users."

[219] *Ibid*, p. 31.

[220] Hout (2006), p.138

4.1.3 Settlement

Mediation has also been characterised as a 'settlement ritual'. It provides a forum for people in dispute to arrive at a settlement that satisfies their interests, a quality which accounts for much of its appeal to the justice system. However, this motivation may be problematic for the HPC. While a complainant has an indisputable interest in the outcome of a fitness to practise process, she or he does not have the only interest. The HPC has a duty to consider the wider public interest, including such matters as whether the registrant presents a potential danger in future. In a sense, once the complaint has been made, the complainant no longer 'owns' it: she or he may be called as a witness, but ultimately the regulator's decision about proceeding is governed by the duty to protect the public. This is spelt out in the case of the Irish Pharmaceutical Society:

"If a complaint is withdrawn, the committee considering it may, with the Council's agreement,

(a decide that no further action is to be taken, or

(b) proceed as if the complaint had not been withdrawn."[221]

Relis' 'parallel worlds' findings tell us that settlement does not feature strongly in most (non-legal) parties' perspectives on mediation. For them a face-to-face encounter held out the promise of a chance to be heard, leading to explanation, apology, future prevention and, in some cases, vindication and shaming the practitioner.[222] We discuss below the implications of this for the style of mediation, but it appears that settlement may be simultaneously over-optimistic (because some complainants will not want to withdraw their complaints even after a positive mediation experience) and under-achieving (because mediation has the potential to deliver more than a simple settlement, particularly future learning, a restored relationship and / or closure).

4.1.4 Learning

A number of commentators have noted the potential of ADR to deliver longer-term learning as parties to a conflict are forced to reconsider their points of view and scrutinise the events that led to the conflict.[223] To quote the French Médiateur de la République again: "Physical mediation, in particular, has an educational value for professionals: it does not seek to hold somebody responsible, but to use the error positively."[224]

One of the limitations of the current fitness to practise process is its concentration on the individual registrant: the HPC has no remit to sanction entities like hospitals or health centres, nor to recommend wider systemic improvements.

[221] Pharmacy Act 2007, S.44 (Republic of Ireland).

[222] Relis, 2008.

[223] For example the French Médiateur de la République (see Section 3.6 above; in the USA Dauer and Marcus (1997), Boothman et al (2009), Szmania et al (2008) and both the Medicare and Kaiser Permanente schemes cite learning as a key objective.

[224] Médiateur de la République, *Annual Report 2009*, p. 6; see also Donaldson in *Trust, Assurance, Safety* (2007) (see note 78).

A mediatory meeting could, however, assist the HPC and the registrant to make greater use of the learning from complaints, particularly if the complainant and registrant participate in a discussion about possible remedial steps. The presence of a representative of the particular profession could also enable that profession to learn from errors by disseminating the agreed outcomes of mediation.

4.1.5 Customer satisfaction

This factor should not be underestimated. While evaluation of outcomes is problematic, because of the difficulty in attaining true experimental conditions,[225] the popularity of mediation with its users is almost universal.[226] The Scottish Legal Complaints Commission, for example, found that mediation was rated as 'Very Good' or 'Excellent' by 72 per cent of its users, while 86 per cent said they would recommend it to others.[227] Mediation's high client-satisfaction ratings have been dismissed by critics asserting that people simply enjoy the attention of an interested professional. However, as the literature on procedural justice illustrates,[228] parties' positive views of their treatment in one setting seems to enhance their respect for the whole system.

This review was commissioned at least in part because of disquieting concerns about the current fitness to practise process: it is possible that a mediatory approach, as part of an integrated approach to complaints, could contribute to improved user-satisfaction.[229]

4.1.6 Other goals

Other goals for mediation could be: faster, cheaper case-processing; the reduction of conflict; and a commitment to party self-determination. However, the critiques highlighted above suggest that it may be less likely to deliver definitive judgements and the public pronouncement of norms (although this may be tempered by allowing publication of anonymised mediated outcomes). It may also not be suitable where one party holds considerably more power than another, although much will depend on the skill of the individual mediator.

4.2 Alternative methods of resolving disputes

Alternative Dispute Resolution, as the name implies, is not limited to one technique. We have discussed mediation in detail, largely because it remains the most common approach to the resolution of disputes. We now consider alternatives to mediation.

[225] See Menkel-Meadow (2010) (see note 13).

[226] See, for example, Jones (ed.) (2004); Doyle (2006) (see note 43); Urwin, P and others, *Evaluating the use of judicial mediation in Employment Tribunals (Ministry of Justice Research Series 7/10)*, 2010 (www.justice.gov.uk/publications/judicial-mediation-research.htm); Ross and Bain (2010) (evaluation of a small claims mediation pilot in Scotland) (see note 43).

[227] See Mantle (2010). See appendix.

[228] *Ibid*.

[229] With wider systemic benefits for the health and wellbeing sector – see Houk and Edelstein (2008); Szmania and others (2008).

4.2.1 'Frontline resolution'

This term was coined by the Scottish Public Services Ombudsman (SPSO)[230] and forms part of his Model Complaints Handling Procedure. It is targeted at "issues that are straightforward and easily resolved, requiring little or no investigation" and refers to "on the spot apology, explanation, or other action to resolve the complaint quickly".[231] The principle of acting quickly has much to commend it: memories are fresh and attitudes have not yet hardened. However, by the time a complaint comes to the attention of the HPC the time for such action may already be past.[232] It could nonetheless issue guidelines, akin to those contained in the SPSO consultation, setting out best practice in frontline resolution. This may be beneficial to both complainants and professionals and have significant preventative potential.

At the present time healthcare professionals may be reticent about apologising.[233] In some instances a complaint will concern actions which the registrant will consider quite appropriate. Clearly s/he will not apologise in such cases. However, an explanation, clearly setting out how the decision was arrived at, may still be important to the complainant and may in fact reduce stress for registrants.[234]

Registrants may also be wary of apologising because they fear that it will amount to an admission of guilt. HPC guidelines would have to make a clear statement about its attitude to such early apologies in subsequent fitness to practise hearings.[235]

SPSO's guidelines place particular stress on organisational action to correct errors. Other members of staff should intervene promptly to deal with problems as soon as they become apparent. In contrast the HPC can only focus on the individual registrant and his or her actions and decisions. It cannot compel other workers to take actions it considers advisable. However, another feature of frontline resolution is that the details of complaints are 'harvested' for systemic improvement. It is conceivable that the HPC could have a role in this, but it would require coordination with local health providers and hospitals. Many registrants are sole practitioners and here the onus will be on them to learn from mistakes and make improvements.

4.2.2 Disposal of cases by consent

The HPC already has a structure for dealing with cases by agreement. This provides

[230] Scottish Public Services Ombudsman, *Consultation on a Statement of Complaint Handling Principles and Guidance on a Model Complaints Handling Procedure*, 2010 (www.spso.org.uk/files/webfm/Publications/Newsletters%20and%20Guides/2010_06_16_SPSO_Consultation.pdf).

[231] *Ibid*, p. 12.

[232] See Mantle (2010).

[233] See discussion on apologies at Section 2.4 above.

[234] Boothman and others (2009), p. 146. 98 per cent of physicians in the University of Michigan Health System approved of the change from a policy of 'defend and deny' to one of transparency and explanation.

[235] For example, British Columbia's Apologies Act 2006 ensures that an apology does not constitute an admission of liability. For further discussion of statutory exclusions of liability, see Vines (2008) (at note 111).

"a means by which the HPC and the registrant concerned can seek to conclude a case without the need for a contested hearing, by putting before a Panel an order of the kind which the Panel would have been likely to make in any event."[236]

Where there is a 'case to answer', the registrant accepts the allegation in full and the proposed remedial action is similar to what would occur after a hearing, the matter can be resolved by consent.

This procedure bears some similarities to a mediatory approach. It is described as a "case management tool" which will reduce the "time taken to deal with allegations" and "the number of contested hearings".[237] Any admission made is treated as a "without prejudice" settlement offer. However, the procedure as currently set out does not envisage a role for the complainant: disposal by consent is negotiated between the registrant and the HPC.

We wonder whether elements of this 'Disposal by Consent' procedure could be adapted to enable a mediatory approach. Similar standards of confidentiality and HPC scrutiny could apply. There would be two major differences. Firstly, the complainant's perspective would be taken into account in arriving at the proposed outcome. The mediator could assist in preparing the proposal for presentation to a Panel. Secondly, the requirement that the registrant admit liability may not be appropriate in some instances. This would require a change in the HPC's practice and procedures, but may be regarded as worthwhile if it enables a larger group of cases to be dealt with by consent.

A mediatory approach could thus broaden the existing disposal by consent mechanism to incorporate the complainant's perspective. The mediator could also assist the HPC in ensuring that the public interest is protected, by being familiar with both the HPC's code of conduct and the range of disposal options available to it. At the same time the face-to-face dimension would enhance complainants' sense that their views are taken into account in fitness to practise decisions.

4.2.3 Recorded concerns

This suggestion comes from the HPC's project brief for this review, the idea being to create learning points for registrants where fitness to practise panels have found 'no case to answer' but nonetheless identify an issue of concern. In one sense this follows best practice in complaints handling by 'harvesting' the information for future learning. It would also accord well with Donaldson's sentiments when he asserts that the recent huge expansion in knowledge and techniques places great pressure on health professionals. As a consequence "the system of regulation needs to put in place mechanisms that deal with honest mistakes fairly, supportively and sympathetically".[238]

We would, however, highlight two concerns with this approach. The first is that it lacks the 'face-to-face' element which we identified earlier as being of great significance in the early resolution of complaints.[239] Even if a written report is thorough and reflective, it is likely to lack the nuance and richness of a dialogue.

[236] HPC practice note on Disposal of Cases by Consent. Available from www.hpc-uk.org/assets/documents/10002473PRACTICE_NOTE_ConsentOrders.pdf

[237] *Ibid*, p. 1.

[238] Donaldson in Trust, Assurance and Safety (2007), p. 16.

[239] Szmania and others (2008); Moody (2005).

The professional's response to a particular statement by the complainant, and the back-and-forth, fine tuning that occurs in real-time conversation, are likely to lead to greater insights and more thorough lessons. These are, of course, potentially risky conversations for registrants and the presence of an impartial 'honest-broker' such as a mediator may be necessary to ensure that they do not revert to what Boothman et al describe as the 'deny and defend' approach.[240] More fundamentally, the relational dimension of complaints should not be forgotten. In one US study, 71 per cent of those who decided to litigate against a physician cited a problem in the physician / patient relationship, clustered around four themes: "deserting the patient" (32%), "devaluing patient and / or family views" (29%), "delivering information poorly" (26%), and "failing to understand the patient and / or family perspective" (13%).[241]

The second concern relates to the earlier discussion about the contrast between consumer complaints and professional regulation.[242] The 'learning point' proposal keeps the focus on the professional rather than the patient or client.

We therefore recommend that the HPC consider the possibility of a mediatory meeting both prior to and following determination by a fitness to practise panel. Prior to a panel the purpose is diversion – as SLCC puts it, mediation is an "opportunity for the parties to have each other's undivided attention as they try to resolve the complaint together".[243] After a panel has determined that there is 'no case to answer' but has identified an issue for the registrant, the focus of mediation will be on explanation, acknowledgement and future learning, both for the individual registrant and the wider health system.[244]

One useful refinement may be to have a representative of the particular profession (this could be an HPC Partner from the same part of the Register) attend the mediatory meeting.[245] His or her role would be to ensure that any plans or proposals comply with best practice within that profession, as well as providing background information for both parties.[246] The HPC Partner could also play a role in recording the 'learning points' and ensuring that they are disseminated within the profession in question.

[240] Boothman and others (2009), p. 143: "The deny and defend approach is mutually exclusive to the honest introspection necessary to true identification of errors, and to the will to correct them." See also the concept of 'reactivity' in which doctors respond to regulatory pressure by behaving defensively, described in McGivern, G. and others, *Statutory Regulation and the Future of Professional Practice in Psychotherapy and Counselling; Evidence from the Field*, (London: Kings College London, 2009) www.kcl.ac.uk/content/1/c6/06/35/90/StatutoryRegulation1.pdf

[241] MacCoun, R., 'Voice, Control and Belonging: The Double-Edged Sword of Procedural Fairness' in *Annual Review of Law and Social Science*, 2005, pp. 171–201 at p. 179.

[242] See Section 2.1.

[243] SLCC Mediation Information Sheet (available from www.scottishlegalcomplaints.com).

[244] McGivern and others (2009) talk of an "'amber zone' of potential malpractice [where mediation] may be a more effective way of tackling poor practice without practitioners being turned into either a patient or a criminal", p. 6.

[245] As in the Albertan Health Professions Act, see Section 3.8 above.

[246] Fisher, Ury and Patton, in their classic text *Getting to Yes*, suggest that negotiators "insist on objective criteria" in order to arrive at principled outcomes. This proposal would assist any HPC mediation scheme to achieve this goal. Fisher, R, Ury, W and Patton, B *Getting to Yes: Negotiating Agreements Without Giving In* (London: Random House, 1991).

It is important to re-state the principle of voluntariness here. The complainant may not wish a face-to-face meeting with the registrant if the panel has declared 'no case to answer', and the HPC clearly cannot compel attendance. However, if the Ipsos MORI findings are replicated throughout the UK it is likely that a significant proportion of complainants would appreciate the opportunity to hear an explanation or apology from the person who they have complained about.

4.2.4 Facilitated resolution / conciliation

For some complainants the idea of sitting in the same room as the person who they believe has harmed them is inconceivable. It may nonetheless be possible for a third party to assist. Platt claims that meeting face-to-face is not essential within healthcare conciliation, saying: "It is possible for a healthcare complaint to be resolved satisfactorily without the need for the parties to meet".[247] Medicare, the US federal provider of support for medical costs, describes this as 'facilitated resolution'.[248] This model provides flexibility and caters for particularly high-conflict situations. However, as well as losing some of the benefits of face-to-face meetings, 'shuttle' meetings can add considerably to the time taken. Platt suggests something akin to the commercial mediation standard model (one full day) or a series of meetings of one-and-a-half to two hours in length, spread over several weeks.[249]

4.2.5 Restorative justice

Complaints that have a bearing on competence are often robustly defended by the professional involved. The allegation that they have been incompetent or lacking in judgement goes to the heart of their professional identity and, for many people, requires to be rebutted. In these circumstances 'early' mediation, prior to a formal investigation, is probably inappropriate. If facts are disputed, how can the complainer and registrant arrive at a shared understanding? While mediators often need to work to balance power (which can ebb and flow from one party to the other during the session) most would be wary of offering mediation where one party holds considerably more power than the other. It could be argued that a health professional, in their area of professional expertise, wields considerably more power than a patient or client.

However, after determination, when the facts have been established and a fitness to practise concern identified, one of the range of disposal options currently available to a panel is mediation. This may not be the most useful term. At this stage in the proceedings the closest parallel is a process known as 'restorative justice'. Restorative justice brings the perpetrator of a crime face to face with the person they have harmed. Its purpose is to allow the person harmed to explain the impact of the crime and to give the perpetrator the opportunity to make amends (including offering an apology).

[247] Platt (2008), p. 10.

[248] Centers for Medicare and Medicaid Services 'Frequently Asked Questions for Medicare Beneficiaries': "Other forms of dispute resolution might be less formal than mediation. For example, a mediator may talk to each party separately to resolve the conflict. This is known as facilitated resolution. The goal of facilitated resolution is to help guide the two parties to a resolution. The difference is that with facilitated resolution you would not speak directly with the doctor or provider". Available from www.medicare.gov/Publications/Pubs/pdf/11348.pdf

[249] Platt (2008) p. 72.

Its proponents forcefully distinguish it from mediation: it is "motivated primarily by the need to address the harm done: it does not take place unless and until the person who has caused the harm has fully and freely admitted to their actions and is willing to take responsibility for them".[250] They suggest that mediation in the context of harm done would be a mistake:

"Worse still, a person harmed would (and should) be outraged by the suggestions that their primary need is to sort out their 'difference of opinion' with the person who has harmed them, so as to create a 'win-win' outcome. This is no place for that kind of moral neutrality."[251]

It could be argued that any mediatory approach taken after a finding against the professional, even if the disposal falls short of removal from the Register, ought more properly to be described as 'restorative justice'. Menkel-Meadow suggests the following characteristics of this process.

1) Describing the act and the harm it has done.
2) Explanation by the perpetrator of what was done and why.
3) Acknowledgement and acceptance of fault by the perpetrator (and apology, if not coerced).
4) Chance to understand why the act occurred.
5) Consideration of appropriate outcomes, not just for the victim but the wider community.
6) Reintegration of the perpetrator into the wider community, via apology and restitution.[252]

It is useful to consider the parallels with a fitness to practise process. First, if the panel considers the allegation well-founded, it is no longer appropriate for the practitioner to dispute the circumstances. The complainant is then in a position to describe the impact of the act or omission on her / him. This could help to bridge the gap identified by Gulland between the causes of a problem and its effect.[253] The panel (and presumably the practitioner) will bring expert knowledge to bear in diagnosing the **cause** of the problem and, if appropriate, attributing blame. However, it is the complainer who has direct, first-hand information about the **effect**. A 'restorative meeting', after a finding of blame, could supplement the step in the current complaints procedure when the panel invites submissions from the registrant and the HPC (but not the complainant) about what action they should take.[254] This would remedy one drawback of the current fitness to practise process, ie the complainer has no voice in deciding the best way for the practitioner to remedy the harm caused.

[250] Brookes, D and McDonough, I, *The Differences Between Mediation and Restorative Justice/Practice* (Scottish Centre for Restorative Justice, November, 2006), p. 4. Available at www.restorativejusticescotland.org.uk/MedvsRJ-P.pdf

[251] *Ibid*, p. 6.

[252] Menkel-Meadow, C, 'Restorative Justice: What Is It and Does It Work?' in *Annual Review of Law and Social Science*, 3:10, 2007, pp. 10.1–10.27 at p.10.4 (Available at http://lawsocsci.annualreviews.org).

[253] Gulland, J, cited in Adler, M, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' in *Modern Law Review*, 69 (6), 2006, pp. 958–85 at p. 968.

[254] Health Professions Council, *How to make a complaint about a health professional*, p. 7. Available at time of writing at www.hpc-uk.org/assets/documents/10002C24Howtomakeacomplaintaboutahealthprofessional.pdf Recently revised (2010) and republished as *How to raise a concern*.

The HPC still needs to ensure that the public interest is taken into account. This could either be the role of the mediator or the HPC Partner.

Returning to Menkel-Meadow's list above, such a meeting could achieve the following.

– Allow the complainant to describe the impact of the action or omission complained about.

– Allow the registrant to explain how it happened and what factors led to the problem.

– Allow the registrant to acknowledge the harm done, to accept her or his fault and to apologise for it (although apologies must be 'genuine' to be of value).[255]

– Give the complainant the opportunity to understand why the harm occurred.

– Discuss possible steps by the registrant to remedy the harm and / or improve her or his competence (the presence of a representative of the particular profession would be useful in giving guidance).

– Consider the wider lessons that may be learned for the registrant, the employer, other health institutions and the NHS.

Restorative justice is not without its critics, however, and there are problems with such an approach. First, in the criminal justice setting, some consider restorative justice to be a 'soft option' offering offenders a meeting rather than more conventional punishments like imprisonment. Second, some see it as 'going through the motions'. As discussed above, apology is unlikely to be valuable unless it is perceived to be genuine. Mantle saw no place for a post-determination meeting within the SLCC's procedures as the parties would have no continuing relationship. She added: "If an apology hasn't been made by either party by then, I feel it would be unlikely to be genuine if made post-investigation".[256]

Finally, there is a persistent critique that victims will be "re-victimized in their retelling of pain or injury suffered".[257] Some complainers may not wish to go through the possibly traumatic experience of repeating their story to the person who caused them harm. Restorative justice practitioners have therefore developed careful protocols to ensure that the perpetrator is clear about the purpose of the meeting and willing to take responsibility for the harm.

Redefining mediation after a complaint has been upheld as a 'restorative meeting' would be an innovative approach, drawing on experience in the criminal justice system and recognising the HPC's role in acting on behalf of the wider society. A pilot project, with a thorough evaluation of outcomes for complainants, registrants, the profession and the public, would be beneficial.

4.3 Benign neglect

One phenomenon that emerged from the literature might be described as benign neglect or 'withering on the vine'. This occurs where a regulatory scheme, presumably with the best of intentions, contains a provision for referral to mediation which is rarely or never used. It applies to the HPC itself where, to date, no mediations have taken place.[258]

[255] See Section 2.4 above.

[256] Mantle (2010), p. 4.

[257] Menkel-Meadow (2007), p. 10.12.

[258] See Section 1.2.1 above.

In Alberta, Canada, the Health Professions Act sets out a thorough, integrated 'Alternative Complaints Resolution' (ACR) process.[259] And yet the College of Physical Therapists of Alberta (one of the colleges created by the Act) omits all reference to ACR in its guidance to the public about complaining, and its 2009 annual report refers simply to investigation, with dismissal or guilt the only outcomes.[260] And while the Alberta College of Speech-Language Pathologists and Audiologists clearly lists ACR among the functions of its Complaints Director,[261] its 2009 annual report names dismissal or resolution as hearing outcomes without reference to ACR.[262]

In Ireland the Pharmacy Act 2007 enables the Council of the Pharmaceutical Society to devise a scheme for resolving complaints by mediation.[263] To date no mediations have taken place.[264] In Belgium the Law of 22 August 2002 created a duty on all hospitals to set up a mediation scheme to deal with patient complaints. A 2008 article summed up the scheme as "too little known", describing how mediation was almost completely unknown to patients and invisible on hospital leaflets.[265] The Church of England Disciplinary Measure appears to have fallen victim to the same phenomenon with just one case out of sixty three dealt with by conciliation in 2008.[266]

Similar results are not uncommon in the ADR world, as the title of one recent article illustrates: "Faster, Cheaper, and Unused: The Paradox of Grievance Mediation in Unionized Environments".[267] It contrasts striking cost and time savings vis-a-vis arbitration with very low uptake for mediation. Further investigation revealed hidden barriers, including union identity in a highly adversarial labour relations setting, meaning that the language of collaboration and reasonableness had little appeal. Similar factors seem to have been at play during the Northern Ireland Police Ombudsman's mediation pilot,[268] with disappointing results and very low take-up.

[259] Province of Alberta, Canada: Health Professions Act 2000 SS 58-60 www.qp.alberta.ca

[260] College of Physical Therapists of Alberta, *Annual Report 2009*, www.cpta.ab.ca/sites/default/files/CPTA_AR09_web.pdf, p. 6.

[261] See www.hearlife.ca/public/data/documents/complaints_director[1].pdf

[262] Alberta College of Speech-Language Pathologists and Audiologists, *Annual Report 2009*, www.acslpa.ab.ca/public/data/documents/2009_Annual_Report_-_Final.pdf

[263] Ireland – Pharmacy Act 2007 S.37, www.pharmaceuticalsociety.ie/Home/upload/File/Pharmacy_Act_2007/Pharmacy%20Act%202007.pdf

[264] Confirmed in a private conversation with Ciara McGoldrick, Head of Fitness to Practise and Legal Affairs, in August 2010.

[265] Delvaux, J, 'La médiation hospitalière: trop peu connue' in *En Marche*, 2008. Available at www.enmarche.be/Sante/Sante_publique/mediation_hospitaliere.htm

[266] *General Synod Clergy Discipline Commission Annual Report for 2008*. Outside the statistics page the report makes no mention whatever of the conciliation option, referring instead to investigation, discipline, penalty by consent or dismissal. See www.cofe.anglican.org/about/gensynod/agendas/july09/gsmisc924.pdf

[267] Monahan, C, 'Faster, Cheaper, and Unused: The Paradox of Grievance Mediation in Unionized Environments' in *Conflict Resolution Quarterly*, 25 (4), 2008, pp. 479–96.

[268] www.policeombudsman.org/Publicationsuploads/mediation.pdf

Both complainants and police officers regarded the scheme as potentially disadvantaging them because of its lack of formal adjudicatory power: "Most of them [police officers] viewed any acceptance on their part to engage in mediation as tantamount to admitting that they had in fact done something wrong and formal investigation in their minds would protect them better than mediation."[269] All of these examples illustrate that conciliation or mediation may seem like a good idea to those drafting regulations, while in practice the idea of formal determination is almost irresistible because the stakes are so high or people are already locked into an adversarial system where the only alternatives are upholding or rejecting the complaint.

And yet in other schemes, in spite of similar early scepticism, those who have participated in mediation tend to be almost uniformly positive about the experience.[270] So why does this 'benign neglect' occur in some settings? One explanation may be simple resistance to change: mediation schemes seem to need to attain a certain critical mass before they are widely accepted. Another possible explanation emerges from Relis' study of medical malpractice mediation. Her findings suggest that parties and their legal advisors spoke of mediation in such different terms that they could be described as occupying "parallel worlds".[271] Parties spoke of wanting explanations, reassurance that fault would not happen again, acknowledgement, apology and even vengeance; their advisors characterised mediation in tactical and strategic terms, such as making parties more 'realistic', illuminating case strengths and weaknesses and saving money. While parties to the HPC's fitness to practise process may not routinely take legal advice, such sentiments are likely to have influenced the advice given by professional bodies and possibly perceptions in the wider culture too.

If the HPC does conclude that mediation ought to be more widely used within its fitness to practise process, the following suggestions from other mediation schemes may help prevent such 'benign neglect'.

- Mediation to occur as early as possible in the process.[272]
- Provide information on the process in all leaflets, websites and publicity regarding complaints.[273]
- Proactively explain the process to registrants and others with whom they work.[274]

[269] *Ibid*, p. 24.

[270] See Mantle (2010); Jones (ed.) (2004); The US Medicare Mediation Program states: "A major reason for the growing use of mediation as a way of dealing with conflict is the satisfaction that many individuals experience when they find that they have the opportunity to communicate directly with the responding party." From Centers for Medicare and Medicaid Services, *Mediation: A New Option for Medicare Beneficiaries* (available at www.cms.gov/BeneComplaintRespProg/Downloads/3a.pdf)

[271] Relis (2009), p. 8: "the parallel worlds of understanding and meaning inhabited by legal actors versus lay disputants, reflecting materially divergent interpretations and functions ascribed to case processing and dispute resolution". Relis describes how legal actors, whether acting for the plaintiff or defendant, view mediation in entirely different terms from their clients.

[272] Delvaux (2008); SPSO (2010).

[273] Delvaux (2008).

[274] Delvaux (2008); Mantle (2010).

– Appoint a 'mediation coordinator' with the specific role of ensuring that the mediation option is fully considered in all cases.[275]

– Ensure independence from health service management.[276]

– Assure confidentiality.[277]

– Mediators need to be credible as well as well-trained and accredited.[278]

4.4 Who should mediate and how?

If the HPC were to choose some form of mediation, it is vital that the mediators be of high quality. This Review has highlighted the daunting range of issues and personalities that they will have to deal with, and because of the novelty of this approach their practice is likely to come under considerable scrutiny. While there are some UK schemes to accredit mediators, none is universally accepted, and different settings apply different standards. The Civil Mediation Council operates a system of registration for workplace mediators.[279] In Scotland the Scottish Mediation Register is a self-certified quality assurance system, covering a wide range of mediation types.[280]

When SLCC recruited mediators to deal with complaints against solicitors it invited applications from experienced mediators and then provided in-house training. It may be thought that those who work for the Equalities Mediation Scheme, already accustomed to working in a 'norm advocating' setting, would readily be able to adapt to a fitness to practise context.

In contrast, the Kaiser Permanente MedicOm scheme recruits those with a thorough grounding in healthcare, and trains them to be ombudsmen / mediators. The reasoning of the scheme's founder was that a healthcare professional could be taught ombudsman / mediation skills in three weeks, but that a deep understanding of the healthcare system required many years of experience.[281] Professional mediators may object to this characterisation of their education, but the HPC may also find it useful to look to those who already have significant experience of the activity complained about. It may be that HPC Partners, trained as mediators, are the people most likely to be seen as credible and acceptable.

[275] Mantle (2010) states: "I think my own 'mediation coordinator' role has been significant. This is not just a matter of sending out letters, but of conveying the values of mediation, particularly to the Client Relations Partners. Of course I also have to convey that even-handedness to the complainers"; See also Doyle (2006), pp.117–19 for a description of the role of the 'mediation officer' in promoting a new mediation service.

[276] In Belgian hospitals the role of mediator can no longer be filled by a director, chief clinician or head of department (Delvaux, 2008).

[277] Delvaux (2008); Boothman and others (2009).

[278] Delvaux (2008).

[279] www.cmcregistered.org

[280] www.scottishmediation.org.uk/mediators/index.asp

[281] Private conversation with Carole Houk, 11 September 2010.

5 Conclusion and recommendations

The regulation of health and wellbeing professionals touches on important issues for individual patients and society as a whole. We rightly expect high standards from those in these professions. At the same time, it is plain that they are placed under greater pressure than ever before, both by new scientific developments and rising public expectations. Any system that deals with allegations about such professionals has to balance a number of considerations. It needs to be fair, and be seen to be fair. It needs to take account of the needs and perspectives of those who complain and those it regulates. It needs to ensure that those who are not fit to practise are prevented from harming the public, while ensuring that those who need short term support receive it. And it needs to provide a process that encourages learning and improvement for individual practitioners and the wider health service.

We have reviewed a range of both complaints and professional regulatory processes. Some are adjudicatory, focussing on investigation and sanctions. Others insert a mediation step into the process in the hope of diverting suitable cases away from investigation and determination. Still others focus on learning, tackling adverse events as soon as they arise and taking a holistic approach to complaints, which includes explanation, apology, acknowledgement, advocacy, investigation, facilitation and mediation. This last approach is probably beyond the remit of the HPC, which must consider the conduct of individual registrants. At the same time the HPC's own research suggests that the adjudicatory approach leaves some complainants with a sense of dissatisfaction. For this group a mediatory approach may offer greater engagement, more information and closure.

There are also potential difficulties with a mediatory approach. It may not reach a conclusion. It may facilitate an outcome unacceptable to the HPC, even though both parties agree to it. Its critics say it can allow the stronger party to dominate, leading to unfair outcomes. It also lacks the public face of adjudication, with its capacity to publicly pronounce rules and guidance.

Having said this, steps can be taken to remedy each of these objections. The growth in mediation schemes around the world and the early findings that they are effective and appreciated suggest that a mediatory approach may have something to offer the HPC. There would appear to be two points in the fitness to practise process at which such a step could be more widely employed.

– **Immediately after an allegation has been received.** There would need to be an initial sift, or 'triage', to ensure that mediation is only offered in appropriate cases. Where there is a potential risk to the public if the registrant continues practising, the case will need to proceed to investigation. Where, however, the registrant appears to have made a mistake or omission that is unlikely to be repeated, a mediatory meeting will allow the complainant to explain how it has affected him or her, and the registrant to give an explanation and apology (if appropriate) and agree steps to prevent the problem happening again. This could avoid the need for full investigation in a proportion of cases.

– **Following an investigation, where an allegation about fitness to practise has been upheld.** Mediation is already among the disposal options open to a panel. We would suggest that this could be re-named a 'restorative meeting'. Borrowing from the restorative justice field, the intention of such a meeting would be to allow the registrant to acknowledge the harm caused to the complainant, to explain what happened and to apologise. The complainant and the registrant would then participate in a discussion about the appropriate remedial steps to restore the registrant's fitness to practise.

In both of the above scenarios the outcome of mediation would still have to be endorsed by the investigating panel (much as currently happens under the Disposal by Consent guidance).[282]

If the HPC wishes to make greater use of the mediation option, at either of the stages outlined above, the following observations may help to ensure that it is used and effective.[283]

– Appoint a 'mediation manager' with the role of setting up a mediation scheme, recruiting the mediators, and ensuring that both registrants and complainants make an informed decision about whether to use it.

– Early intervention mediation should be a default step in the fitness to practise process, with both parties having the option to refuse it. A triage system could help to ensure that unsuitable cases are not mediated (ie where there is an ongoing risk to the public).

– Agreements arrived at in early intervention mediation should be ratified by the HPC. Those which are not should be remitted back for hearing and judgement.

– The mediators should be highly experienced practitioners. A mix of those with a background in the health service and those who do not is probably appropriate (bearing in mind that members of the public may have concerns about a mediator who is a health professional 'siding' with the registrant).

– Mediators should be encouraged to take a broad approach, allowing for explanation, apology, remedy and future learning as well as withdrawal of the complaint.

– One option would be to follow the Alberta model in having a representative of the particular profession present in the mediation. This person would provide normative guidance within the mediation as well as ensuring that mediation insights are shared with the wider profession. Because the benefits and disadvantages of this approach are not clear from the literature we would recommend that it be piloted in a small area and evaluated.

– The mediation discussions should be confidential, but with the possibility of the outcome being more widely publicised where both parties consent.

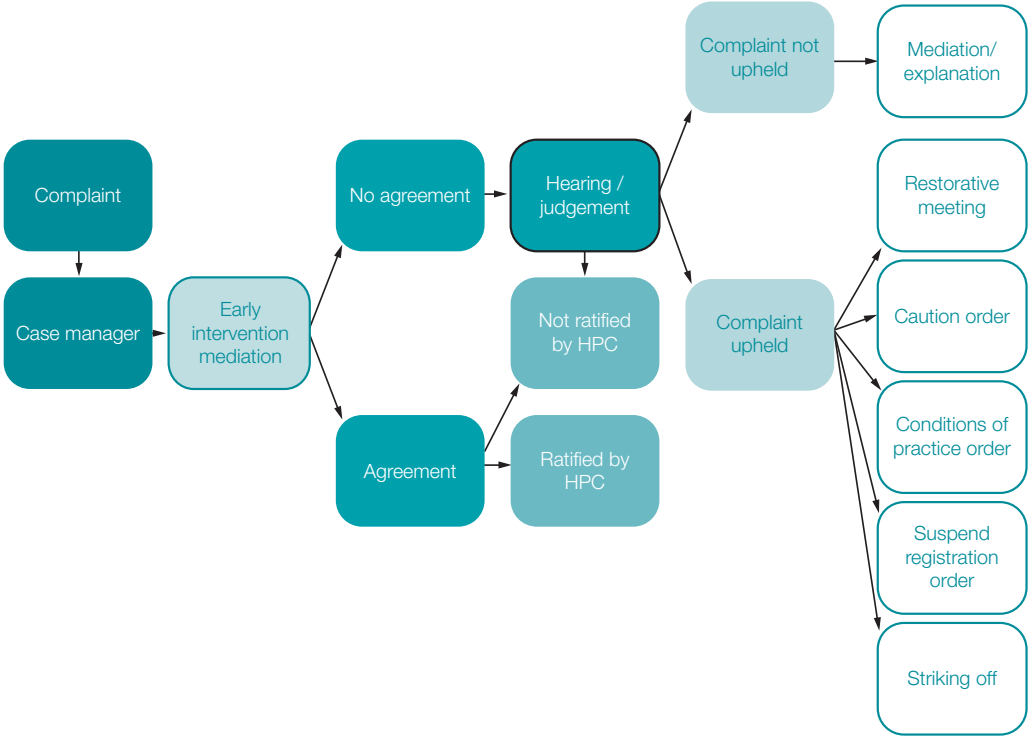
– Any new scheme needs to be widely publicised through leaflets and the HPC's website, and supported by appropriate policies and procedures.

[282] See Section 2.2 above.

[283] This list should be read in conjunction with the suggestions for preventing 'benign neglect' at Section 4.3 above.

We have outlined below a possible revised fitness to practise process, designed to encourage the use of a mediatory approach at the two distinct stages described above. It is also conceivable that mediation would be appreciated where an allegation has not been upheld but where the complainant still seeks an explanation for the action that led to the complaint. We have reflected this in the diagram.

Figure 4 – Possible modifications to the HPC's fitness to practise process



This study raises fundamental issues about the role of a fitness to practise process. It has highlighted the often difficult role of health regulators in balancing the needs of complainants and the public interest, as well as the need to deal with past harm and future risk. Whatever the merits of 'frontline resolution', it seems most appropriate for service providers. The HPC, on the other hand, does seem to be well-placed to re-visit its existing statutory mandate to mediate. The reasons for this could include diversion of some cases away from investigation, to maximise the learning opportunities, to enhance procedural fairness and to insert a face-to-face element into the fitness to practise process. While we have highlighted some significant practical hurdles, most of the literature indicates a high degree of enthusiasm and commitment for such an approach, particularly once people have experienced it.

Appendix

Interview with Marjorie Mantle, Mediation Manager, Scottish Legal Complaints Commission

Note: This interview took place on Thursday 12 August 2010 in the offices of SLCC. The interview was not recorded and the following record is based on handwritten notes taken at the time. C is Charlie Irvine, Visiting Lecturer, the Law School, University of Strathclyde and M is Marjorie Mantle.

C How long has the SLCC mediation scheme been operating?

M Since 1 October 2008.

C Tell me about numbers.

M So far we have conducted 35 mediations, out of 141 where it was suggested. However, if you look more closely at the figures we experienced a slow start and take-up has definitely increased recently.

C What factors have contributed to the increase in use of the service?

M First of all, word of mouth among professionals – once a few had tried it they must have heard that it's worth trying. Secondly, I think my own 'mediation coordinator' role has been significant. This is not just a matter of sending out letters, but of conveying the values of mediation, particularly to the Client Relations Partners. Of course I also have to convey that even-handedness to the complainers. I think a third factor has been genuine goodwill on the part of solicitors, who say 'We don't want an unhappy client'. I think they feel their personal integrity is at stake.

C When do lawyers hear about the complaint?

M Once the complaint is accepted as an eligible complaint. There is a sifting process by our Gateway Team. The SLCC has a legal requirement to serve notice on the complainer and the practitioner, setting out what the complaint is, who will investigate it or, if appropriate, why it is not being investigated.

C How is mediation explained?

M The same explanation is given to both complainer and solicitor. The Gateway Team sends out information. I send it again, in case they didn't read it the first time. The terms of the explanation are that mediation may help to achieve 'resolution' of the complaint. I describe it as 'a solution that you can both live with'.

C Would you use the term 'redress' rather than resolution?

M No. I don't think that would be helpful.

C What is the role, if any, of financial compensation within the scheme?

M There is no set amount for specific types of cases but there is a tariff to which we would normally expect Investigators and Determination Committees to adhere. But I explain to complainers that the amounts involved are generally pretty small, say, £50 or £100.

C Are you 'anchoring' their expectations?

M Very much so. It's important that they are realistic. If they have paid fees of two and a half grand and are expecting to have them waived, it may not happen.

C One of the documented strategies that mediators use, particularly in court settings, is 'reality testing'. That is, they say to the clients 'Here's what you're likely to end up with, after X months of delay and hassle and Y pounds of legal costs. You might want to take that into account when considering what is a fair settlement.' Having done some of this work, it strikes me that there is no equivalent for SLCC mediators, and so complainers' expectations may remain unchallenged. Are you intending to do anything about this?

M Some stats are beginning to appear. I dare say mediators could use them in their discussions with clients.

C [I showed Marjorie a quote from Harris et al (2008) which picked up on Genn's (1999) finding that success of dispute resolution strategies depended on the type of case. It states that "people simply wanted to solve the problem rather than secure any punishment, revenge or an apology and so they wanted routes to redress that were quick, cheap and stress-free". Gulland similarly found that in Scotland some people bring a complaint in respect of their community care "with reluctance, hoping their problem can be sorted out with minimum of fuss".] Do you think these comments apply to people who complain about legal professionals?

M In my experience a number of complainers want the solicitor 'punished'. A minority want the problem solved with the minimum of fuss. However, and this is the benefit of mediation, when face-to-face with the person they wanted to 'beat up' they realise that this is just another person. Of course, this is just my personal view.

C Can you comment on the role of apologies?

M It could be helpful in some sense for a solicitor to apologise without it being held against them by a professional body or insurer if that is the case.

C [I then showed Marjorie a list on p.39 of Harris et al setting out a variety of reasons why mediation works in a Special Educational Needs setting. These are:

- **"Allows communications to take place freely**
- **Overcomes deadlock**
- **Assists negotiations**
- **Focuses on important issues and needs**
- **Gets the right people and information together at the same time**
- **Makes everyone part of the solution**
- **Rebuilds trust**
- **Restores and safeguards relationships**
- **Explores options for mutual gain"**

I asked Marjorie which of these apply to the SLCC mediation scheme]

M They all apply, with the reservation that mediation may rebuild trust and may restore relationships. In addition to these I think it enables people to draw a line under the episode. It's better than a determination because they have both been involved in the process, so they can kind of say, 'I still disagree with you but....'

C What are the goals of mediation?

M To seek early resolution of problems that can be sorted out between the people most immediately involved.

C Is diversion from investigation a specific goal?

M Yes, in a sense. We want to help parties resolve matters quickly. If appropriate, mediation can be a useful option for them to consider.

C Have the cases delivered those goals?

M Yes, even though only 21 out of 35 settled. [Marjorie then described her sense that one of the problems with mediation in this context is that there is 'no down side for the complainer'. In other words, there is little incentive for the complainer to withdraw their complaint because it costs them nothing to continue on to investigation. In contrast the professional has a great deal to lose in terms of time, cost and reputation.]

C How might the SLCC mediation scheme be improved?

M
- More information for Client Relations Partners (CRPs).
- An education exercise for professionals, telling them what they can expect from mediation. Ideally I would have an education exercise for the public too, but they are in the nature of things harder to identify.
- Perhaps it would create a more level playing field if complainers were charged a fee if they go to investigation and their complaint is not upheld. However the legislation we work under does not allow for this.

C Who rejects the offer of mediation more, complainers or legal practitioners?

M Out of 98 where mediation was rejected:

Both said 'no':8

Complainer said 'no':62

Practitioner said 'no':28

C How would you account for these numbers?

M I think there is a range of factors:

- Complainers have nothing to lose by continuing to investigation.
- Someone else will make the decision for them.
- Some are genuinely too nervous to sit in the same room as the practitioner even though I do provide two separate rooms and advise the parties that they don't have to meet face-to-face if they don't wish.
- Some complainers may be 'vexatious' complainers.

C Could you say more about the actual feedback you have received to date?

M The most significant finding, for me, is that, of 34 responses to this question [a return rate of 98%] 31 said they would recommend it to others, and three said they would not.

Overall evaluation of mediation:

Excellent	15
Very good	11
Good	9
Poor	1

These are roughly the same for complainers and practitioners.

C Could you see a role for mediation post-investigation, in the same way that restorative justice operates after a finding of guilt in the criminal justice system?

M That doesn't sit comfortably for me. Why would they? They will have no continuing relationship.

C I guess that's true in restorative justice as well, but it does offer a chance for an apology to be made.

M If an apology hasn't been made by either party by then, I feel it would be unlikely to be genuine if made post-investigation.

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Ipsos MORI

Mediation Research

Research for the Health Professions Council: Final Report

October 2011

Legal notice

Contents

Executive Summary

This qualitative study by Ipsos MORI on behalf of the HPC explored the views of key audiences on the potential use and value of mediation within the HPC's regulatory regime. The research was conducted among members of the public, past complainants, registered professionals and key stakeholders to establish whether there is a place for the use of mediation as a regulatory tool in handling certain types of complaints, and if so, where any mediation process may best sit.

Four discussion groups were conducted, two with members of the general public, and two with registrants. In addition, 18 telephone depth interviews were carried out with registrants, members of the public and employers who were recent complainants. A further ten telephone depth interviews were carried out with key stakeholders identified by the HPC from professional bodies, unions, regulatory bodies and third-sector/not-for-profit organisations.

The key findings are outlined in this executive summary.

Perceptions of mediation

While the overall concept of mediation was familiar to many participants, there was less clarity on the detail. Some misperceptions, for example, were that mediation is not a voluntary process, that its objective is to avoid formal legal proceedings, that an agreement between the two parties is not a necessary outcome, and that there could be no purpose in mediation if there is no fitness to practise issue.

Participants tended to expect that the mediated agreement would include undertakings on behalf of the registrant to do more training or participate in a programme of mentoring or supervision. This is worth considering if the HPC develops the further use of mediation: it will be helpful to demonstrate not only that complainant and registrant can come to a mediated agreement, but also to show that the *content* of that mediated agreement is aligned with the HPC's goal of ensuring public protection

Does mediation fit within the HPC's regulatory regime?

Opinions were divided on whether the HPC should pursue mediation as part of the fitness to practise process. Some participants were supportive of the HPC investigating whether mediation may work, while others did not see a fit because they felt that mediation would widen the HPC's remit.

Participants were mindful of the complexities of the fitness to practise process and the types of cases the HPC deals with. In light of this, many felt that the merits or otherwise of mediation would need to be assessed on a case-by-case basis.

Arguments in favour of the HPC using mediation more widely included that it was seen to be a more flexible alternative route to the current fitness to practise process and could achieve a good outcome for the individual parties involved. Arguments against greater use of mediation revolved around the questions of whether a mediated agreement between two parties would necessarily be aligned with the greater public interest, the perceived risk being that this could undermine the rigour of the fitness to practise process.

Where could mediation fit in the fitness to practise process?

We explored the perceived value of mediation at several key points in the fitness to practice process - where a concern did not meet the standard of acceptance; at the mid-point when the investigating committee determines whether there is a case to answer; and at the end of the process following a formal hearing. Where participants supported greater use of mediation, they felt it could add value at all these stages - though the arguments for and against differed at each stage (as detailed in the report).

Regardless of where the HPC may decide to use mediation, participants identified a number of requirements that need to be met in order to minimise the risk and ensure that the public interest is protected. For instance, it was felt important that the HPC thoroughly investigate every complaint; be involved in the mediation process e.g. as a party to the mediation or as an observer; and, most importantly, approve the mediated agreement. Of the individual mediator, there was a preference for someone who was independent and impartial, skilled in mediation, with an understanding of the professional fields of expertise involved. There was also a desire for transparency in the process, and follow-up to ensure that any actions in the mediated agreement were implemented. Some also felt that in case the mediation process did *not* produce an agreement, there should be a safeguard mechanism in place; for instance, some participants suggested the parties should be required to return to the fitness to practise process.

Additional perceptions of the process and how it might be improved

There was a desire for alternative mechanisms to sit alongside the formal fitness to practise process to lend flexibility to what is perceived as a ‘one size fits all’ process. Mediation was seen by participants as one way to do this; offering a two-tier complaints process could be another alternative.

Some participants wanted the HPC to provide assistance outside of the fitness to practise process – for example, to give informal advice about a concern without triggering the formal complaints process, or to allow feedback about a registrant concerning lower level issues. Facilitated dialogue between complainants and registrants (that is not intended to reach an agreement but provides an opportunity for each party to express their feelings) was suggested as an option in the process to provide closure for the parties involved.

Complainants expressed a desire for the HPC to play an advocacy role during the fitness to practise process – providing opportunities for face-to-face discussions with complainants to talk them through what can seem to be an opaque process.

Participants identified that some employers use the HPC to resolve staff management issues that should instead be resolved at a local level. They suggested that the HPC could take an enhanced role in some cases and push staff management issues back to employers.

Recommendations and next steps

On the basis of the findings from this research, we put forward five recommendations for consideration by the HPC.

1. **Proceed with a pilot to provide empirical data**

The HPC has already indicated that it is planning a pilot. The diversity of opinion and polarisation of views across participants suggests that it would be useful for the HPC to test the concept of mediation within its regulatory regime by running a pilot. A pilot would provide empirical evidence about the use and value of mediatory processes.

2. **Run a staged pilot which lays the foundation stones for mediation at different points in the fitness to practise process**

Feedback from research participants suggests that the perceived benefits and associated risks are different at different points in the fitness to practice process; and that the benefits are perceived as greatest when it is used early in the process. In light of this, we would recommend that any mediation pilot should be designed specifically to examine the benefits and risks of mediation *at each stage* of the fitness to practice process. Given the greater perceived benefits of using mediation early in the fitness to practice process, it may also be worth designing the pilot to look at this stage first. Staged implementation would provide the foundation for subsequent stages and allow learning from early stages to inform the later ones.

In order to gauge the effectiveness of a staged approach, a piece of evaluation work that runs alongside the pilot will be required – a process evaluation that builds the evidence base for mediation and gathers feedback from participants in the process before taking up mediation, on completion of mediation and then again, a couple of months later.

3. **Provide clear messages about the HPC's regulatory regime**

As a regulator the HPC sets standards of practise and then holds registered professionals to those standards. Decisions are required at the strategic level about whether or not greater use of mediation fits within the HPC's regulatory regime. Such decisions about strategic intent are difficult ones to make, but the HPC needs to be clear

as an organisation on its rationale and context for mediation in a regulatory regime. If the HPC opts to make greater use of mediation as one of its tools, then the organisation must be able to provide clear and consistent messages to external stakeholders (registrants, professional bodies, and members of the public alike) of the reasons why it is encouraging mediation.

4. Communicate explicitly about mediation

There were varying levels of misunderstanding among participants about the details of the purpose and process of mediation. Consequently, their support and opposition for mediation within the HPC's regulatory regime was based on their own perceptions of what mediation means. This misunderstanding was further complicated by a lack of understanding of the fitness to practise process. Therefore it will be critical for the HPC to communicate explicitly about what it means by mediation – the processes involved and the objectives that mediation is looking to achieve – and to continue to improve the clarity of communications about the fitness to practise process itself.

5. Consider additional ways to enhance the fitness to practise process

There were a number of additional mechanisms suggested by participants that the HPC may consider in order to improve the fitness to practise process – mechanisms that would lend flexibility to what is perceived as a 'one size fits all' process:

- Investigate offering a two-tier complaints process where there is an advisory service / helpline to provide assistance during the fitness to practise process and also outside of it. This could also offer facilitated dialogue between complainants and registrants that is not intended to reach an agreement but provides an opportunity for each party to express their feelings.
- Look at ways in which to communicate with employers to prevent them misusing the fitness to practise process as a way to deal with internal disciplinary issues.
- Consider taking an advocacy role during the fitness to practise process and provide complainants with opportunities for more direct contact (e.g. face-to-face discussions to talk complainants through the steps in the process).
- Continue to improve communications with complainants during the fitness to practise process.

1. Introduction

This report presents the findings of a qualitative study conducted by the Ipsos MORI Social Research Institute on the Health Professions Council (HPC). The purpose of the research is to explore the views of key audiences on the potential use of mediation within the HPC's regulatory regime. The research was conducted among members of the public, other HPC stakeholders ('key stakeholders') and the 15 different health professionals that the HPC regulates. The work was commissioned by the HPC through a competitive tendering process.

1.1 Background

The HPC's regulatory regime

The Health Professions Council (HPC) is an independent regulator of health professionals set up to protect the members of the public who use the services of those it regulates. To do this, the HPC maintains a register of health professionals who meet their standards for training, professional skills, behaviour and health. It approves and monitors the UK educational programmes which lead to registration and takes action if a registrant's fitness to practise falls below the standards.

The HPC has been in existence since April 2002 and now regulates 15 professions (around 213,000 registrants), comprising:

- Arts therapists
- Biomedical scientists
- Chiropodists / podiatrists
- Clinical scientists
- Dietitians
- Hearing aid dispensers
- Occupational therapists
- Operating department practitioners
- Orthoptists
- Paramedics
- Physiotherapists
- Practitioner psychologists
- Prosthetists / orthotists
- Radiographers
- Speech and language therapists

Each of these professions has at least one professional title that is protected by law, including those shown above. This means, for example, that anyone using the title 'physiotherapist' or 'dietitian' must be registered with the HPC. It is a criminal offence for someone to claim they are registered with the HPC when they are not, or to use a protected title that they are not entitled to use, and the HPC prosecutes people who commit these crimes.

Next year the regulation of social workers in England will be transferred from the General Social Care Council to the HPC.

The HPC is funded entirely from fees payable by the professionals that it regulates. In 2010-11, it had an annual income of approximately £16 million of which more than 40% (£7.2 million) was spent on the operations of the fitness to practise function.

Previous research

This study forms part of a work stream that the HPC has carried out over the last five years examining the fitness to practise complaints process and identifying ways in which this process could be improved.

In October 2007, Jackie Gulland was commissioned by the HPC to undertake a scoping exercise on existing research on complaints mechanisms.[1] The review found that there was very little published research on complaints against the so called 'non-medical' professions regulated by the HPC. The report also identified a number of barriers to complaining, including difficulties in obtaining information about the complaints procedure, a problem exacerbated by the complexity of organisations providing care.

Another key finding was that whilst most studies of complainants found that people were dissatisfied with the complaints procedure, their satisfaction (or lack of it) depended in part on what they were expecting from the procedure in the first place. Attempting to resolve problems can be stressful and a lack of common understanding of the complaints procedure can be a source of dissatisfaction among users. Communication with complainants and potential complainants about what can and cannot be dealt with is therefore vital. With this in mind, a potential area of future research highlighted in the review was exploring expectations of complainants when they make a complaint to a regulatory body.

In 2009 the HPC commissioned Ipsos MORI to undertake a qualitative study of expectations of the fitness to practise process which included depth interviews with past complainants, discussion groups with HPC registrants and members of the public and interviews with other key stakeholders.

The study concurred with the Gulland report in that members of the public complain for a variety of reasons and that the purpose and scope of the fitness to practise process are not well understood. For instance, there was some confusion as to whether the remit of the HPC would include informal advice and mediation as well as a formal fitness to practise process. Furthermore, all stakeholder groups said they would be keen to see a mediation stage in the fitness to practise process; providing opportunities for an explanation or apology in recognition that this would be a satisfactory resolution to many complaints, and because some complainants were initially only looking to open channels of communication with the healthcare professional in question. Essentially there was an expectation from stakeholder groups that informal resolution would be one option available through the HPC.

[1] Gulland J (2007) Scoping report for the HPC on existing research on complaints mechanisms

The findings of the Ipsos MORI report, in concert with parallel developments in the wider regulatory and judicial world, prompted the HPC to consider alternative dispute resolution and whether it has a place in the HPC fitness to practise process. In 2010 the HPC commissioned Charlie Irvine and colleagues at the University of Strathclyde Law School to review the literature available in this area.[2] The review identified some of the benefits of ADR in other contexts and outlined the components of good practice. These included offering mediation early in the process; emphasising face-to-face communication between the complainant and registrant; facilitating explanation, apology (where appropriate) and plans for future learning and prevention. The review stressed that the role of a "mediation champion" during the introduction of a mediation scheme was important to successful implementation. It also highlighted two mechanisms by which the HPC could ensure that the outcomes of mediation align with its duty to protect the public – refer back to the Investigating Panel for ratification and/or have an HPC partner as part of the mediation process.

1.2 Objectives

Building on the work that the HPC had already completed in this area, the objectives of this particular study were twofold:

- to gather the views of HPC's key audiences on the potential use of mediation within its regulatory regime; and
- to establish whether there is a place for the use of mediation as a regulatory tool in handling certain types of complaints, and if so, where any mediation process may best sit.

The findings of this study will inform the approach that the HPC takes towards mediation, as well as adding to the evidence base of professional health and social care regulation more widely.

1.3 Methodology

The qualitative research methodology comprised in-depth telephone interviews with recent complainants to the HPC and with key HPC stakeholders, and discussion groups among health professionals (those registered with the HPC) and members of the public.

Qualitative research with recent complainants

Eighteen telephone depth interviews with recent complainants were conducted between 14 July and 8 August 2011.

[2] Irvine C, Robertson R, Clark, B (2010) Alternative mechanisms for resolving disputes: a literature review for the Health Professions Council www.hpc-uk.org

The HPC recruited from a list of recent complainants, inviting complainants to take part in the research. Potential interviewees were selected on the basis of the following factors:

- whether they had complained as a member of the general public, a registered health professional or an employer; and
- the stage in the fitness to practise process that their complaint had reached (i.e. not a fitness to practise issue, not referred to a final hearing, referred to a final hearing and proven not to be well founded, or referred to a final hearing and proven to be well founded).

Table 1 displays a breakdown of the sample of the recent complainants provided to Ipsos MORI by the HPC and the number of interviews completed with each type of complainant.[3]

Table 1 Breakdown of complainants in the sample and those interviewed

	Members of the public		**Registered health professionals**		**Employers**	
	Sample provided	Interview complete	Sample provided	Interview complete	Sample provided	Interview complete
Not about fitness to practise[4]	3	2	3	2	0	-
Not referred to a final hearing[5]	4	2	3	2	2	2
Referred to a final hearing and case is proven not well founded[6]	5	2	2	2	5	2
Referred to a final hearing and case is proven well founded[7]	0	-	0	-	7	2

[3] Because of the system of opt-in, it was not possible to know how many of the leads would emerge for the 18 interviews to be conducted from. In consenting to the research, recent complainants were aware that the HPC would provide their contact details to Ipsos MORI (see Appendix 1 for a copy of the opt-in letter).

[4] This is where a concern has been reported to the HPC, the HPC has carried out a preliminary investigation and determined that the concern does not meet the standard of acceptance – it is not about a professional who is registered with the HPC or it is not about the fitness to practise of the professional.

[5] This is where a case meets the standard of acceptance for fitness to practise and is considered by an Investigating Committee which decides that there is no case to answer (i.e. that the case does not need to be taken any further).

[6] This is where the Investigating Committee refers the case to be heard by a panel of another HPC Committee, which decides that the allegation is not proven and the professional's fitness to practise is not impaired.

[7] This is where the Investigating Committee refers the case to be heard by a panel of another HPC committee, which decides that the allegation is proven and the professional's fitness to practise is impaired. The panel has powers to take no further action or order mediation, caution the professional,

Qualitative research with key stakeholders

Ten key stakeholder interviews were conducted between 18 July and 11 August 2011. The HPC provided Ipsos MORI with a list of 35 key stakeholders from which to conduct the interviews, and Ipsos MORI selected a sample from this list. The sample included a mix of professional bodies, unions, regulatory bodies and third sector/not-for-profit organisations.

Qualitative research with members of the public and registrants

Four discussion groups were held – two in London and two in Birmingham. In each location two groups were held consecutively, one with members of the public and one with health professionals registered with the HPC.

The registrant groups were recruited via telephone by Ipsos MORI's specialist recruitment team from a random sample (stratified by health profession and location – Birmingham and London) of 172 registrants provided by the HPC. A letter was sent in advance to potential participants. Registrants from across the 15 professions that the HPC regulates took part, with a mix of representatives from the different professions in each group. The discussion group members were also mixed in terms of age and gender.

The participants of the other groups were recruited by Ipsos MORI's specialist recruitment team via an on street face-to-face method.

Table 2 gives a summary of the participants recruited for each group:

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place conditions of practise on the professional, suspend the professional from practising or strike the professional from the register.

Table 2 Breakdown of Discussion Group Participants

	Location	Date	Gender	Age	Social Grade
Members of the Public Group 1	London	20/07/2011	5 women / 4 men	37-81	C2, D, E
Members of the Public Group 2	Birmingham	16/08/2011	5 women / 3 men	18-32	B,C1
				Professions Represented	
HPC Registrant Group 1	London	20/07/2011	4 women / 4 men	Biomedical Scientist; Clinical Scientist; Dietitian; Occupational Therapist; Paramedic; Physiotherapist; Speech and Language Therapist	
HPC Registrant Group 2	Birmingham	16/08/2011	7 women / 3 men	Art Therapist; Biomedical Scientist, Dietitian; Hearing Aid Dispenser; Operating Department Practitioner; Podiatrist; Speech and Language Therapist	

Source: Ipsos MORI

The in-depth interviews tended to last between 30 – 45 minutes and the discussion groups lasted around 90 minutes each. All discussion groups and in-depth interviews were led by a topic guide, which was developed and agreed with the HPC. Topic guides are included in Appendix 2.

All qualitative in-depth interviews and discussion groups were moderated by an Ipsos MORI moderator. The participants themselves dictated the general content and flow of the discussions, within the framework of the topics introduced by the moderators.

With the permission of participants, all discussions were recorded and then transcribed for analysis. Quotations are cited textually in the analysis to add detail to the interpretation. The identities of participants have been kept confidential throughout.

1.4 Interpretation of qualitative findings

This study explored the attitudes and experiences of participants. The aim was not to generalise to the wider population in terms of the prevalence of attitudes or

behaviours but to identify and explore the different issues and themes relating to the subject being researched.

Care has been taken throughout this report to ensure that comments are not able to be attributed to individual participants.

1.5 Publication of data

The standard Ipsos MORI Terms and Conditions apply to this, as to all studies we carry out. Compliance with the MRS Code of Conduct and our clearing is necessary of any copy or data for publication, use on websites or press releases which contain any data derived from Ipsos MORI research. This is to protect our client's reputation and integrity as much as our own. We recognise that it is in no-one's best interests to have research findings published which could be misinterpreted, or could appear to be inaccurately, or misleadingly, presented.

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2. Perceptions of mediation

We begin this report with a look at general awareness of mediation and the perceptions, misperceptions and expectations participants had for mediation in relation to fitness to practise.

Key Findings: Perceptions of mediation

- **Mediation means different things to different people. While the overall concept of mediation was familiar with participants and they had an intuitive awareness of what mediation involved, there was less clarity on the detail. Therefore, if mediation is to be offered, we recommend that the HPC provides complete clarity about what the process will involve and its objectives.**
- **Some misperceptions, for example, were that mediation is not a voluntary process, that an agreement between the two parties is not a necessary outcome, and that there could be no purpose in mediation if there is no fitness to practise issue.**
- **Participants tended to expect that the mediated agreement would include undertakings on behalf of the registrant to do more training or participate in a programme of mentoring or supervision.**

While detailed awareness of mediation was low, the general concept was familiar across all the audiences we spoke to, and there was an intuitive awareness of what it involved. This was the case for members of the public, some of whom were aware of mediation (and had a positive perception of it) through their work or through dealing with issues such as neighbour disputes, where the local authority or housing provider may offer mediation, and divorce. Examples of other settings in which participants were aware of mediation included the family court and employment tribunal disputes.

Getting into the detail of mediation, the picture became more complex. Most importantly, some participants used the term 'mediation' to mean different things, and had different ideas about what it should involve if offered by the HPC. The message was that if mediation is to be offered, there must be complete clarity about what the process will involve and what its objectives will be in order to manage expectations and provide reassurance that the fitness to practise process itself, with its impartial investigative rigour and power of sanctions to address poor or dangerous practise, is not superseded.

2.1 Awareness of mediation

Most participants were aware of the basics of mediation: that it is a method of addressing disputes that involves bringing together the two parties to meet face-to-face, with a neutral and independent facilitator, to explore ways of resolving or at least overcoming the dispute.

My understanding of mediation is that it's a confidential process, which, if done by an experienced mediator, can be incredibly valuable in bringing two people who are diametrically opposed to actually maybe not agree, but agree to differ rather than just continue on in the same old vein.
Stakeholder

Some members of the public had experience or awareness of different types of mediation through their work or other areas of their life.

The woman came from the housing office and she just offered mediation between the two.
Member of the public, Birmingham

They use a mediator to treat divorce.
Member of the public, London

We do mediation at the workplace with the victims and the offenders… for the victim to be able to ask the offender why they've done what they've done and for the offender to explain it or to apologise.
Member or the public, Birmingham

Participants in their spontaneous understanding were often less clear about the detailed defining features of mediation, for example that it is voluntary rather than compulsory.

They shouldn't be forced into it but if they [are] offered the opportunity to do it then I think that's a good thing.
Member of the public, London

Another participant viewed mediation as being necessarily fixed to the stage prior to any dispute or legal process to see if the formal proceedings can be avoided.

It's a process whereby the complainant and the person complained about could be brought together prior to the instigation of, shall we say, formal proceedings to see if the complaint can be satisfied in any way other than a full hearing.
Stakeholder

Whilst clear on mediation's dispute resolution focus, some participants did not see the face-to-face element as essential.

As far as I'm aware of mediation it's getting the two parties together, it may not be in the same room, but to really try and resolve the issues.
Stakeholder

2.2 Perceptions of mediation

On further discussion of mediation it became apparent that mediation can mean different things to different people. Subsequently, expectations of what mediation can and should achieve differed.

As we have seen, mediation may be viewed as a way to avoid formal processes if possible. Another stakeholder saw mediation in a similar way, but proposed a slightly different type of process to supplement the fitness to practise process – one where reaching agreement is *not* mandated:

Mediation is perhaps not the appropriate term. The purpose of mediation as it's used in the UK today is to come to a resolution as a way to avoid litigation. It is not a replacement for fitness to practise, because [mediation as applied to fitness to practise] would have two parties engaging in dialogue rather than having an agreement that comes out at the end of the mediation process.
Stakeholder

The underlying concern of the stakeholder here is that having a mediation process whereby agreements can be reached might undermine or supersede the formal fitness to practise process. This was one of the more notable concerns that participants in general had about the HPC offering mediation.

What I don't think is appropriate is to replace the current system with mediation because from my perspective it's very clear and helpful that there are the standards for behaviour and practice that are set in conjunction with the professions…if those standards are broken then it's possible that the practitioner is not fit to practice, and therefore you do need a proper process of inquiry and investigation and adjudication…. So it shouldn't be a replacement for that. I know that some people are looking at mediation as a kind of alternative to FTP practices and for me they can't and shouldn't be an alternative.
Stakeholder

Some participants could not see how mediation could be of use at any stage other than early on in the process and, even then, only if a fitness to practise case to answer had been found:

If you're looking to save time, money, heartache, mediation should come in at an early stage… If it's disproved at stage one, what's going to be achieved by mediation because HPC have already decided there's no case to answer… If sanctions have been imposed

then surely you should have the answers already.
Stakeholder

Some stakeholders, registrants and employers who had been through the complaints process could see a role for mediation to address issues of competency where a programme of training/revision, mentoring or supervision was appropriate.

There's competency to practise where people are not bad, but they're not doing their job properly, and mediation would be a tool to explore and one can find out that the management or whoever's complaining are not providing the correct training. Mediation would pick that apart and allow the process to move forward to benefit both parties.
Registrant, London

In such cases, it was suggested that the employer and registered professional could agree a programme of work (the mediated agreement) which would then be approved by the HPC. Technically this type of mediation would be outside the traditional scope of formal mediation because there is a pre-determined outcome requirement – a programme of work – and one which a complainant is unlikely to be able to have meaningful input into because it requires a comprehensive knowledge of the professional standards of practise.

There was an expectation among all audiences that any mediated agreement would have a specific set of outcomes including undertakings to complete a programme of training, mentoring or supervision as deemed appropriate for the issue. Furthermore, there was a sense that the success of the mediation process would be judged on the outcomes included in the mediated agreement.

I suppose it depends on what comes out of the final process. You could put as many policies in place as you wish but it's what's churned out the other end that makes the difference. So if there's no end result and nothing's learned by the process, then it's pointless.
Stakeholder

3. Does mediation fit within the HPC's regulatory regime?

This chapter considers the appropriateness of mediation in the HPC's regulatory regime, specifically as part of the fitness to practise process. We address key questions including whether participants felt that mediation fits within the HPC's remit and whether it is something that the HPC should be making greater use of.

Key Findings: Does mediation fit within the HPC's regulatory regime?

- **Opinions were divided on whether the HPC should pursue mediation as part of the fitness to practise process.**
- **Some participants were supportive of the HPC investigating whether mediation may work because they saw that it could provide an alternative route to resolution – one that was more flexible compared to the current 'one size fits all' process.**
- **Other participants felt that mediation did not fit with the HPC's primary duty because they thought the purpose of mediation was to achieve a good outcome for the individual parties involved, rather than to protect the health and wellbeing of the public.**
- **Mediation was not considered to be appropriate for the HPC because it involved compromise and there was a perception that it could put the rigour of the fitness to practise process at risk by placing the regulator's responsibility on the individuals involved.**
- **Some viewed mediation as a role for other parties such as employers or professional bodies, but not the HPC. However, in cases where there was a small employer or no professional body, then participants felt that it may be appropriate for the HPC to offer mediation.**

As we have seen participants generally were positive about the concept of mediation. However, this did not necessarily translate to an endorsement of mediation within the HPC's regulatory regime, and there were mixed views about whether mediation could fit within the fitness to practise process. While some participants were open minded and supported the HPC in investigating the merits of mediation within its regulatory regime, others were more cautious and some felt that there is not a place for mediation at all because it does not fit within the HPC's current remit. In general, this broke down as follows: the participants who were least familiar with the fitness to practise process (principally, members of the public) were most likely to be positive about the HPC offering mediation, while those who were most familiar (eg registrants, past complainants or key stakeholders) were less sure that mediation should be a

role for the HPC. However, as the participant comments illustrate below, this distinction was by no means cut and dried.

… it's not appropriate for everyone, but [mediation] can be an excellent choice for people. And you know, when it works it works very, very well.
Stakeholder

I think they [the HPC] should be encouraged to use every method appropriate to the individual case to reach their objective. Their objective is to protect the public and mediation is one of the tools in the tool box that they may or may not choose to use.
Complainant (registrant)

I did think, "oh that's a really good idea" when I first [heard], but actually I am not quite sure what place it would have, given the responsibilities of the HPC to legally protect the public from harm.
Complainant (employer)

Overall, stakeholders, registered professionals, past complainants and members of the public alike were mindful of the complexities of the fitness to practise process and the types of cases that the HPC deals with. Consequently, the overwhelming response from all participants to the question of whether mediation was a role for the HPC was: "it depends". This theme had multiple aspects: it depended on the objectives of mediation; it depended on the type of case in question; it depended on the specific individuals involved and whether employers are involved. There was a sense that the merits or otherwise of mediation needed to be assessed on a case-by-case basis because "every case is unique to its own fact".

I think each case would have to be assessed on its own merit and depending what it is I don't think you could say carte blanche we only mediate on XYZ cases…
Complainant (registrant)

But I don't see why it should necessarily be completely incompatible with their overarching statutory role, again because they have the process in place to do the vetting of cases, and they're obviously very clear on the instances in which mediation just could not be offered in terms of the severity of the complaint or the general circumstances…
Stakeholder

All participants asked further questions about the parameters and outcomes of mediation expressed in various ways. For example, was it about compromise; was it to provide an alternative route to the existing fitness to practise process; or was it intended as a preventative measure to avoid a concern becoming a fitness to

practise complaint? One stakeholder pointed to other regulators who do this, such as the General Optical Council which is seen to deal with non-fitness to practise issues effectively using mediation. The rest of this chapter discusses various elements relating to the parameters for and desired outcomes from mediation.

To provide an alternative, more flexible route to resolution

The formality and rigour of the formal fitness to practise process was deemed to be necessary and appropriate (and participants were unanimous in this opinion). Participants in support of mediation saw that it could enhance the fitness to practise process by offering an alternative process that is less formal and one that provides greater flexibility.

There needs to be a degree of flexibility I think, so I think mediation is needed.
Stakeholder

On the other hand, some were concerned that mediation would be too flexible and put the rigour of the fitness to practise process at risk because they felt it would detract from the seriousness of the fitness to practise process; standards may not be upheld and cases may not be treated fairly.

A regulator is there to be objective and say "Actually no these are the lines, these are what you work within" and they shouldn't be blurred. Whereas mediation feels like the idea of it is that you find compromise on both sides
Complainant (employer)

There was also a sense that in using mediation the HPC would be abdicating its responsibilities as a regulator because the objectives of the individual involved differ from that of the HPC.

Contrary to this, while many recent complainants we spoke to felt that mediation was not something that would have been helpful in their own particular case, they were generally positive about the general idea of mediation being suggested by the HPC in other cases. As one member of the public pointed out:

I think the disadvantage of it is no matter what the case was or whether I was the complainant or the person who's having the complaint against I don't think I'd want to face the other person in a room. Well if I found someone complaining against me I wouldn't want to see them and if I was the one making the complaint I don't think I'd want to see that person either.
Member of the public, Birmingham

In addition to uncovering whether people want mediation, complainants and stakeholders stressed a desire for any mediation process to be sensitive and

receptive to the needs of the individuals involved. One stakeholder summed it up as follows:

Some people will embrace the process. Others will obviously fight against it and say no, this is what it is and this is the way it needs to be done sort of things. We have that ourselves within our own disciplinary procedure you know. Some people are happy to look for mediation, quite happy to sit round a table. Others sometimes feel intimidated. You know, they're having to face a manager or a senior manager or whatever, and talk face to face to them. So in that respect then I would imagine it depends on the character of the person as well.
Stakeholder

Mediation meets the interest of the individuals involved so it doesn't fit with the HPC's core role

Many participants saw the primary purpose of mediation as dispute resolution between the affected parties – valuable in achieving a good outcome for the individual parties involved. As a result, they did not see a natural fit with the HPC's role of protecting the health and wellbeing of the public and felt that mediation sat outside of the remit of the HPC, or was not the HPC's primary duty.

Mediation or dispute resolution may be in the patient's interest, but it is not in the public interest.
Stakeholder

In fact, several stakeholders were adamant that it was not the HPC's role to attend to the well-being of individual parties involved in disputes.

I think the prime objective of mediation with the HPC is to ensure that the person is safe to practice their art on the public. I don't see mediation in this context to keeping people happy. I think that's wrong.
Stakeholder

[The HPC's role] isn't to find compromise and make it all a bit softer and more comfortable for everybody. To me when you get to the stage of a regulator being involved it really is giving a sense of the gravity and the magnitude of the situation. It shouldn't be a sort of a soft option.
Complainant (employer)

While some stakeholders felt very strongly that the role of the HPC was not about making the individual parties feel better, others recognised that the formal process

could be difficult for the parties to go through and that something to soften the process could be useful even though it was not the HPC's primary consideration.

[Making the individuals feel better] – it's not their primary consideration, I suppose you'd have to say that. But in that, you know, the regulator is regulating human beings, I don't see why there couldn't be something in place in certain circumstances to avoid the battering and the bruising.
Stakeholder

Mediation is not a regulator's job – others should do it

Some registrants and complainants who saw value in mediation but did not consider it to be part of the HPC's remit, suggested that mediation should be the responsibility of employers or professional bodies instead.

Internally within the Trust I would see us doing the mediation and trying to manage things but my initial thought is the regulator should be hard and fast and very clear about the expectations.
Complainant (employer)

Conversely, where other parties were not available or able to address the issues concerned, participants felt that there may be a role for the HPC – particularly when the registrant is an independent practitioner or where a small employer is involved that lacks internal mechanisms for dispute resolution:

A practitioner within an NHS or independent sector service …will have their own disciplinary procedures to go through and it's more likely to come with a successful outcome in terms of people understanding what has happened within a process.
Complainant (employer)

[Mediation may be useful for] resolution of longer term problems that are just going to sit there and fester if they're not addressed. And if HPC aren't addressing them, and whether it's a part of their role is a separate question, there may be instances where nobody else is going to address it.
Stakeholder

One stakeholder flagged the importance of ensuring that when the employer representative of a larger organisation (such as a Trust) is involved in mediation, then the HPC would need to ensure that the representative has a good knowledge of the professional standards and requirements (e.g. a health professional within the organisation such as a head of department rather than a member of the HR department).

Participants who were familiar with the intricacies of the fitness to practise process, particularly stakeholders or employers who had submitted complaints, found it hard to see a fit for mediation in big formal cases where many more than just two people involved (e.g. solicitors and Trust organisations).

Stakeholders and employer complainants also suggested that there may be a role for mediation between the HPC and the registrant (rather than the complainant and the registrant) because complainants have different agendas and expectations which are not necessarily in the public interest. In the eyes of one stakeholder, a complainant was a witness to the issue and the HPC (not the complainant) was the party who had been wronged.

...the patient is in effect a witness to the event; they are not the individual who is wronged in that sense. It's the HPC that is wronged from my view and the individual [registrant] has wronged their professional status, they have not wronged the patient. If they've wronged the patient, there are other avenues for the patient to take and that's civil action.
Stakeholder

Another stakeholder acknowledged while it was not the HPC's role to make people feel better, it did fall within the HPC remit to ensure that individuals involved have their rights protected and have outcomes and processes clearly communicated. This is linked to some additional ways that the HPC could meet the needs of individuals involved in the fitness to practise process (discussed in chapter five).

Some participants saw a role for mediation to help the parties to understand the HPC's decision more clearly. For instance, one employer complainant who felt that the outcome of the HPC's investigation had not delivered as hard a line as the Trust's own disciplinary procedures, suggested that mediation may have been helpful for the registrant in their case.

...[the registrant] was left kind of, I suppose angry and aggrieved that we had deemed him unfit to practice, because he couldn't practice as a qualified member of staff, but the HPC who he is professionally accountable to, didn't deem him as unfit, so you can imagine that actually caused conflict for him.
Complainant (employer)

Stakeholders and registrants alike voiced concerns about the motivations of the different parties involved, and felt that these would need to be considered in deciding whether mediation was appropriate for the HPC or not. As highlighted in previous research Ipsos MORI conducted for the HPC's fitness to practise directorate, complainants had expectations that their clinical issues would be resolved when they submitted a complaint to the HPC.

We do the case notes from the HPC hearings and having attended some HPC hearings as well. I think sometimes that doesn't satisfy

the people that are taking those cases up, I mean they don't actually necessarily want that person to be punished, what they want is their clinical issues resolved to their satisfaction and the HPC cannot really do that so I am wondering if that may be a role for mediation whether that's carried out by the HPC or by A N Other organisation.
Stakeholder

4. Where could mediation fit in the fitness to practise process?

We asked participants for their views on where mediation may fit within the fitness to practise process. The HPC had already completed some work in identifying possible points in the fitness to practise process where mediation may be of value. These were the three key decision points for the HPC in the fitness to practise process:

1. at the beginning of the fitness to practise process when a concern is submitted and does not meet the standard of acceptance for a fitness to practise issue;
2. in the middle of the fitness to practise process when an investigating committee finds whether there is a case answer; and
3. at the end of the process after a formal hearing is held.

These propositions were put to participants to gauge their reactions to these suggestions, their preferences and to provide insight into the reasons for their views on these options.

Key Findings – Where could mediation fit in the fitness to practise process?

- **Participants perceived that mediation could sit at the beginning of the process when a concern did not meet the standard of acceptance for a fitness to practise issue. Here it was felt that mediation would not affect the fitness to practise process itself and was therefore seen as less of a risk. However, it would extend the HPC's remit and some participants thought that the HPC should have no involvement in issues that are not fitness to practise.**
- **Mediation could be used at a mid point in the fitness to practise process when an investigating committee finds whether there is a case to answer. Participants felt this could become an option to offer a less formal process for resolution and could reduce the length of the process. However, some participants were concerned that doing so would extend the HPC's remit, blurring their current role, and may give the perception that the issue is not being taken seriously.**

- **The use of mediation at the end of the fitness to practise process, after a formal hearing has been held would provide the opportunity for face-to-face dialogue between the parties and therefore closure (something that a formal hearing is not considered to provide). However, participants felt that this would lengthen the process therefore increasing resource requirements, and that it is not part of the HPC's core role of protecting the public because it only looks after the interests of the individuals involved.**
- **Regardless of where the HPC may decide to use mediation, participants identified a number of requirements that need to be met in order to minimise the risk and ensure that the public interest is protected. For instance, it was felt important that the HPC thoroughly investigate every complaint; be involved in the mediation process e.g. as a party to the mediation or as an observer; and, most importantly, approve the mediated agreement. Of the individual mediator, there was a preference for someone who is independent and impartial, who is skilled in mediation and also has an understanding of the professional fields of expertise involved. There was also a desire for transparency in the process, a back-up if mediation failed and follow-up to ensure that any actions in the mediated agreement have been implemented.**

4.1 Three possible points where mediation could be used

It is important to note that participants found it difficult to think about mediation at the three different points in the fitness to practise process. As we have seen, this stems from the complexity of the process; mis-understandings about mediation and what it entails; and differing views as to the purpose of mediation as discussed in the previous chapter.

The table overleaf summarises the advantages and disadvantages that participants identified from introducing mediation at three key decision points in the fitness to practise process. We discuss the various arguments put forward about mediation in each stage in the process in more detail before concluding with the elements that participants felt were important for ensuring that mediation meets the public interest.

Point in the fitness to practise process where mediation may be used	Pros	Cons
1. At the beginning of the fitness to practise process when a concern is submitted and does not meet the standard of acceptance for a fitness to practise issue	Helps to resolve disputes for which there are no alterative mechanisms of resolution	Extends the HPC's remit beyond fitness to practise Mediation only looks after the individuals involved and does not protect the public
2. In the middle of the fitness to practise process when an investigating committee finds whether there is a case answer	Prevents the need for a formal hearing Offers a less formal process for resolution Reduces the length of the process and allows the HPC to resolve cases more quickly Achieves more satisfactory and practical outcomes than through a purely adversarial system	Extends the HPC's remit beyond fitness to practise if there is no case to answer Mediation only looks after the individuals involved and does not protect the public May give perception that the issue is not being taken seriously If mediation is offered before a hearing judgement is made, there is a risk of "plea bargaining" Increases the need for resources; it is not a cheap or easy option because it needs proper facilitation and both sides need to be fully prepared Blurs the current role of the HPC
3. At the end of the process after a formal hearing is held	An opportunity for apology Face-to-face dialogue to "rehumanise" the other party Helps parties involved to understand the HPC's decision more clearly Helps to determine the next steps (e.g. programme of retraining, supervision, mentoring) Provides closure when the hearing judgement provides a clear outcome for the practitioner, but leaves the complainant hanging	It is not a cheap or easy option because it needs proper facilitation and both sides need to be fully prepared Unnecessary because parties have already had an opportunity to hear from each side at the hearing Mediation only looks after the individuals involved and does not protect the public The registrant is unlikely to agree to it because they have already been punished It is not the HPC's role as a regulator to make the parties involved feel better Lengthens the process

Stage 1: At the beginning of the fitness to practise process when a concern is submitted and does not meet the standard of acceptance for a fitness to practise issue

Participants tended to want the option of mediation 'up front' in the fitness to practise process because they saw it as a more cost-effective way of resolving disputes with the potential to prevent concerns from escalating to formal fitness to practise complaints. Mediation at this point was considered particularly appropriate for issues that were highly subjective (i.e. personality issues or differences in opinions) and was perceived as less risky than at other stages of the fitness to practise process.

I think in cases where it's a sort of subjective complaint that it might be better to have mediation earlier in the process. I mean obviously, if you have some sort of complaint against a person where they clearly haven't upheld the standards of the profession, whereas it's more a black and white type case then it might be better later.
Registrant, Birmingham

If you made a complaint about me and the HPC decided it was a fitness to practise issue and you were to decide "I'm happy now", that it doesn't take away the threat that I would possibly pose to another patient. So surely the only time you could bring mediation into it is once fitness to practise has been decided that that's not an issue.
Registrant, London

[Mediation] right at the beginning is important because you might find that some people are quite hasty in putting a complaint in and if there's a chance for a bit of breathing space to sit down and say "Well actually do you understand the implications of reporting this person?", to think about, and have a discussion around that, and they've thought about what their actions were.
Registrant, Birmingham

However others, particularly some stakeholders and registrants, were clear that where a case does not concern a fitness to practise issue, then the HPC should have no involvement in the case.

If there clearly isn't a case to answer I think it's up to the parties concerned if they wish to go to mediation and it shouldn't be something that HPC provide as a resource.
Stakeholder

…so perhaps the individual could say, "actually I would like you to mediate, I would like some mediation on this because I am sitting here, I have gone through this, I have been fairly treated by the HPC but I feel that my organisation is not upholding what you said". So perhaps the route into it could either be via the organisation needing mediation or the individual as an outcome of a hearing.
Complainant (employer)

Registrants and stakeholders were also concerned that there would be little obligation for a registered professional to take part in mediation if the HPC deemed that it was not a fitness to practise issue.

If it was in cases when it wasn't a fitness to practise issue, then what's your obligation to go to mediation? 'Cause you're not going to get struck off by the HPC or complained about by them then really you don't then feel that you have to go to the mediation because there's no comeback.
Registrant, London

Stage 2: In the middle of the fitness to practise process when an investigating committee finds whether there is a case to answer

Registrants, members of the public and stakeholders saw the benefits in a process that was quicker than a formal hearing by which the parties reach an outcome that is satisfactory to everyone, and identified that the costs and burden on the HPC would decrease as a result. They were also positive about the idea of a less formal process that would reduce the burden on the parties involved.

[Mediation] would feel less formal and less intimidating for everybody involved and it may, you know, enable better relationships after complaints have been made.
Complainant (employer)

Stakeholders and registrants felt that mediation could be appropriate in cases where the HPC and the registrant understand the issues and agree about what happened. For example, issues about a registrant's health or competence where a formal hearing was not required, but mediation could help identify gaps in training as mentioned earlier.

On the other hand, participants identified a risk that having two separate routes at this point – mediation vs. formal hearing – would result in inconsistent decisions. Several stakeholders pointed out that this may be addressed by appropriate guidance and criteria for decision makers.

Other stakeholders proposed that mediation at this point would not necessarily realise cost savings because it was a resource intensive process and there was a risk of drop-outs should one of the parties change their mind and decide not to go ahead.

It's not a cheap option. It's something that needs proper facilitation and preparation on both sides, both parties need to understand what the potential benefits of it are and what the risks of it are because there are risks associated with it in terms of people opening themselves up and saying what they think and what they feel.
Stakeholder

Some participants found it difficult to see how mediation could have a place later in the fitness to practise process because the mediator had a neutral role and this would not be appropriate the further through the process, and the more serious, the case gets.

The concept of mediation before a hearing judgement is made did not sit well with participants. Stakeholders identified a risk of "plea bargaining" at this point, particularly when the registrant did not accept that they had done something wrong.

It would be dangerous when a registrant says yes to mediation to get a better outcome.
Stakeholder

There was also a feeling that mediation at this stage could duplicate processes.

Stage 3: At the end of the process after a formal hearing is held

In general participants saw limited value in having mediation at the end of the fitness to practise process (e.g. after sanctions awarded at a formal hearing). There was a feeling that this would go against the purpose of mediation because the hearing would have already provided a resolution.

Again, what's the point of having the mediation if they've made their decision? … That would then seem to me to go against the whole concept of mediation…
Registrant, Birmingham

As at stage one, some complainants, registrants and stakeholders were unsure whether registrants would agree to mediation, particularly if it followed a formal investigation and hearing.

The registrant thinks 'hang on I have been through the mill here, I am not going to go through that as well, I have already been punished, and as far as I am concerned it is finished, you have won your case'.
Complainant (employer)

Furthermore, participants expressed concern about the outcome of mediation being a factor in the panel's decisions about sanctions.

I think one would have to be extremely clear about what the purpose of that was because in a sense it's kind of devolving some level of responsibility to the practitioner and the client and actually the responsibility is with the adjudication panel.
Stakeholder

Although one stakeholder suggested that it could be worthwhile in providing the parties involved with some closure (particularly for the complainant because the hearing judgement provides a clear outcome for the registrant) and an opportunity to "rehumanise" each other, this was in the sense of a facilitated dialogue process rather than formal mediation (see chapter five).

For the practitioner [the hearing outcome] is very clear [but]... in terms of the patient or patients that are involved, it's an ending of a sort but the problem with it is that in some circumstances it can leave people you know at the kind of penultimate chapter of the book as it were.
Stakeholder

Some participants also felt that mediation at this point could help parties to understand the HPC's decision more clearly. Again, this seemed more in a facilitated dialogue sense rather than formal mediation. Similarly, an employer suggested that mediation could help resolve differences between an employer's decision and the HPC's decision if, for instance, the employer had placed greater restrictions on the registrant than the HPC.

Others viewed mediation as unnecessary at this point because they felt the parties would have already had an opportunity to hear from each side at the hearing.

It [mediation] may be helpful for the patient and registrant to have discussion, but there is no purpose for mediation if the patient attended the hearing and heard the evidence.
Stakeholder

In the eyes of some participants a formal hearing delivers on the HPC's remit to protect the public by ensuring that registrants are safe to practise, but mediation would only look after the interests of the individuals involved and not the public interest.

[HPC has] the responsibility to protect the public and mediation is simply there ... to keep both sides happy. That's not really the object [of the fitness to practise process] is it? It's to prove to the public that this person will be capable at the end of it.
Stakeholder

Another stakeholder suggested that mediation may have a subsequent place in the fitness to practise process: for reviews that are held by the HPC (e.g. after two years). These could be mediated, rather than go through a formal hearing.

As in stage one, there were fears among registrants and stakeholders that the registrant would not agree to take part in mediation. Some participants also felt that mediation at this stage would lengthen an already long process.

4.2 Requirements for mediation to meet the public interest

Stakeholders, registrants, members of the public and past complainants alike were supportive of the HPC's primary purpose to project the public interest and ensure the safety of people who use the services of registered health professionals. As a result, it would seem to be important that the HPC ensures that mediation meets the public interest and participants made a number of suggestions for achieving this. These included discussions around who the mediators should be and the skills and knowledge they require, to involvement of the HPC in the mediation process, including signing off the mediated agreement.

Thorough investigation of every complaint

First and foremost people wanted reassurance that each complaint would be thoroughly investigated. They saw this as critical to maintain the credibility of the regulator and ensure that any fitness to practise issues are addressed.

Should the HPC be a party to the mediation?

Some stakeholders and employers felt that the HPC should be a party to the mediation, while others argued that mediation is a two party process. One suggestion was that the HPC could be an observer but not part of the mediation process. However, this could raise issues of confidentiality that would need to be considered because the parties (particularly the registrant) may not be as open and honest in the mediation, as compared with when the HPC is not present.

An HPC panel should sign-off the agreement

Complainants, registrants, stakeholders and members of the public all agreed that the HPC would need to approve any mediation agreement that was reached, and that this would be an important part of protecting the public interest.

Shouldn't there be more monitoring of the outcome and taking action if needs be in completing the [mediation] process?
Member of the public, Birmingham

A report needs to be written and signed off by the HPC I think would be the best way forward 'cause then mediation remains independent until the final report is published but with the understanding that the HPC receive the report and action may be taken upon that report.
Complainant (employer)

But this would not be easy if mediation was undertaken in the traditional sense because mediation is a confidential process:

You get into practical difficulties if the sign-off of that agreement, which is done confidentially with the mediator, then has to be assessed by a professional person to see whether it's relevant.
Stakeholder

Furthermore, there was a belief from all participants that the HPC's decision should be final. One member of the public compared this with the role of the financial ombudsman in a dispute between an individual and an insurance company:

...so if you take it to the financial ombudsman, and he says, look, the insurance company just pay what they think is the value of the car, end of story. Now you can't argue with that guy can you?
Member of the public, London

Independence and impartiality of the mediator

All participants said they desired a mediation process that was fair and unbiased. Members of the public (including complainants) expressed concern about a mediator's power to influence the case one way or another and suggested therefore that the mediator may need to be someone totally independent of the HPC. Otherwise, there was a perceived risk that people would question whether the mediator would be more supportive of the health professional. This view was supported by some complainants who felt that the HPC was on the side of the professional and therefore would not be appropriate to mediate.

There was some confusion among participants as to whether a mediator would act as an advocate or be totally independent. This misunderstanding was more likely among those less familiar with the details of mediation (e.g. members of the public, some registered professionals).

I don't see how an HPC funded mediator could be neutral because the HPC is a regulatory body.
Registrant, Birmingham

The HPC should be more concerned about the facts of the case so that's why I don't see their role as being the mediator. I think it's slightly conflicting with their role too... 'cause they're interested in protecting the public.
Stakeholder

Independent oversight of the mediation process

Some participants felt that mediators should be totally independent of the HPC to ensure the integrity of the process. For example, one stakeholder felt that the HPC is currently losing support from registrants as they are not representing their members

adequately, and therefore while agreeing that mediation is a good tool, would rather someone other than the HPC administered it. Others thought that it would be appropriate for the mediator to be a member of the HPC provided they had the appropriate skills (discussed below). Importantly, stakeholders, members of the public, complainants and registrants equated independence with being unbiased and impartial and viewed this as being an important characteristic of any mediator.

Skills and knowledge of the mediator

There was a consensus that the mediator would need to be a very highly skilled person. There was a perception that HPC staff are not skilled mediators, and there were mixed views as to whether mediation should be outsourced or whether HPC staff could be trained appropriately.

If this is a programme that's put into place then HPC staff need to be properly trained in mediation; and mediation now is quite a big business and there are national standards for practice, national training guidelines and so forth so you know that would be the first thing to do.
Stakeholder

In addition to having strong mediation skills, a number of participants felt that mediators should perhaps have relevant medical training and an understanding of the fields of expertise of the professional(s) involved. In their eyes, the mediation process could involve a lot of discussion around professional roles, practise and expected standards, and as a consequence, they felt that the mediator should have relevant training or experience in the professional area. Participants felt that this would help ensure that a good mediated agreement is achieved.

Need to have an alternative if a mediated agreement can not be reached

In light of the voluntary nature of mediation and the risk of drop-outs, all participants requested that there be a default process (e.g. to a public hearing) should mediation fail to reach an agreement between the parties.

They should be offered mediation and if it works, then great. [if it doesn't then it] just goes back into the process that would have been carried out anyway.
Member of the public, Birmingham

Transparency

Transparency was viewed as an important part of ensuring the wider public interest. The HPC maintains this by holding hearings in public and having each decision written out, so stakeholders, registrants and complainants alike wanted some reassurance that any mediation process would also have transparency considerations.

If mediation is taken up, then the HPC needs to make sure that it is involved and enough information is put into the public domain about the outcome.
Stakeholder

Implementation and follow-up of the agreement

Participants felt that it was important for the HPC to monitor and ensure that registrants are held to any undertakings set out in a mediated agreement.

'Cause if it didn't happen, if they said they were going on training and then didn't go on training, there'd have to be a consequence to that.
Member of the public, Birmingham

5. Additional perceptions of the process and how it might be improved

In addition to thinking about meditation, we also listened for ways that participants suggested the HPC could improve the fitness to practise process. This chapter considers mechanisms other than mediation that participants raised.

Key Findings: Alternatives participants identified in addition to mediation

- **There was a desire for alternative mechanisms to sit alongside the formal fitness to practise process to lend flexibility to what is perceived as a 'one size fits all' process. Mediation was seen by participants as one way to do this; offering a two-tier complaints process could be another alternative.**
- **Some participants would like the HPC to provide assistance outside of the fitness to practise process – for example, to give informal advice about a concern without triggering the formal complaints process, or to allow feedback about a registrant concerning lower level issues. Facilitated dialogue between complainants and registrants (that is not intended to reach an agreement but provides an opportunity for each party to express their feelings) was suggested as an option in the process to provide closure for the parties involved.**
- **Complainants expressed a desire for the HPC to play an advocacy role during the fitness to practise process – providing opportunities for face-to-face discussions with complainants to talk them through what can seem to be an opaque process.**
- **Participants thought that some employers used the HPC to resolve staff management issues that should instead be resolved at a local level. They suggested that the HPC could take an enhanced role in some cases and push staff management issues back to employers.**

In discussing the fitness to practise process, participants felt that it was thorough and that it was an appropriately serious, formal and impartial accountability mechanism to hold registered professionals to standards. However, they perceived that there were a number of issues that could be addressed in order to improve the process:

- The process was considered to be too long and complex, and participants were concerned that a protracted complaints process could adversely affect all involved.

- Participants felt that the process was not always proportionate, that it did not take into account the complainants' desired outcome which may be short of a full hearing an disciplinary sanctions, and that it was 'black and white' with limited flexibility to adapt to the seriousness of the case.

- Complainants sometimes did not understand the outcomes of the process.

- The process, particularly the hearing, was seen to be adversarial and stressful for complainants.

- There was a certain perceived 'remoteness' to the fitness to practise process because complainants felt they had little opportunity to influence its course or express what they would like to see come out of it.

- Some complainants felt that communications from the HPC were distant and impersonal because they were by letter or email rather than face-to-face or by telephone.

- Registrants and stakeholders reported that there was a tendency for employers to refer cases to the HPC that would be more appropriately dealt with through internal disciplinary procedures.

The discussions we had with registrants, complainants, stakeholders and the public emphasised that every case was unique, no single approach was right in all circumstances, and that what people wanted in terms of approach and outcomes likewise varied from case to case. Some participants felt that the fitness to practise complaints process could appear to be a 'one size fits all' formal process – one that was not always sensitive to what the complainant wanted or to the nature and seriousness of the complaint.

I think it would be foolish to say that it [mediation] can't help [HPC to protect the public interest], but it isn't the answer to everything. I think there will be situations where it is extremely useful and helpful and get things back on an even keel as it were. In some ways it's trying to think is there one size fits all, and there never is, because each complaint and process is different from the last one.
Stakeholder

Other mechanisms and approaches were raised during discussions with participants, as possible ways to address some of the issues they identified with the process – some still less formal than mediation – a process that has its own air of formality, being strictly defined and with its emphasis on reaching a binding agreement. In the rest of this chapter the perceptions of each of these other less formal approaches to resolution are described.

Two tier process for complaints

Complainants sometimes expressed the view that the HPC appeared 'distant and remote'. Being able to speak to someone not just during the complaints process but also outside it, for example to get advice informally on whether there may be grounds

to be concerned about a colleague or employee's fitness to practise without the formal process being triggered, would be welcomed.

Maybe if someone could ring you and say "what do you feel about this, do you think this is somebody that you feel is fit to carry on working or that we need to be unduly concerned about".
Complainant (employer)

Furthermore, one complainant wanted a mechanism to be able to provide feedback about a registrant without escalating it to a formal complaint, for instance about lower level development issues (such as bedside manner). This could be achieved through providing a second tier process for handling such complaints.

One of the key features of mediation that makes it what it is (rather than simply a dialogue) is that it requires both participants to sign up to a written agreement at the end. There is therefore a level of formality built into the process. However, often all that a complainant wants is an apology and a chance to air their concerns. The issue may be rooted in personality issues or feuds rather than real fitness to practise concerns. Therefore there may be room to provide facilitated dialogue *without* the requirement to reach an outcome or agreement. Reacting to one of the scenarios presented in the discussion group, one registrant said:

It looks like there's some personality clash there, and in that instance you would hope that somebody could sit round a table with them and try and get it out of their system without going through either a complaint through the professional body or through the HPC.
Registrant, Birmingham

Facilitated dialogue may work best where no power relationships are involved. An independent individual rather than a manager could act as the facilitator.

If I was managing a situation where two people had a personality clash the power thing might get in the way, so I might ask a colleague to sit with them and just talk it through. So it's not a power thing, I'm not trying to manage it as a manager, but you're trying to manage the situation so it gets sorted. You could as a colleague and just say "Look, just come and have a chat to these to people, as another HPC person".
Registrant, Birmingham

Advocacy role for the HPC

Many members of the public who had made a complaint in the past had felt at a disadvantage in the complaints process. In the eyes of some, the HPC took the side of the professional and none were particularly keen on meeting the professional face-to-face in a mediation scenario due to the hurt caused by the perceived poor treatment they received. Some also spoke about the emotional risk being too great – that they would quickly get upset in such a situation.

Some participants said they would welcome opportunities for face-to-face meetings with the HPC to talk them through what can seem to be an opaque process – particularly to a member of the public who is even less likely than a registrant or employer to have insight into how the process works. Some members of the public who were complainants expressed some dissatisfaction with the HPC's communications, and some of the questions they were asked – in one case being asked to recall exact dates and times of appointments over the course of three years – only added to their distress.

While some complainants felt that the HPC was on the side of professionals, registrants did not share this perception. In fact, they tended to view the HPC as a 'strict' regulator and talked about the nervousness they felt upon receiving a letter through the mail from the HPC (which included the invitation to take part in this research).

Enhanced role for HPC in relation to employers

As mentioned, some participants were concerned that employers can sometimes misuse the HPC complaints process to avoid having to deal internally with under-performing staff.

They're using HPC as a management tool which is not what it's there for.
Registrant, London

Participants suggested that HPC should take a more robust stance with employers, ensuring that the issue really is appropriate for the HPC to deal with, or whether it is something that should be dealt with locally through the employer's own processes.

Whenever the Trust goes to the HPC, maybe the HPC need to say "Hold on a second, is this an issue for us, or is it an issue for you to deal with?"
Registrant, Birmingham

One registrant described an incident where a patient complained to their service because certain information was shared with their GP. They presented this as typical of many complaints: they are not really about fitness to practise, and could be resolved through dialogue and prevented from going further. Another registrant pointed out that:

Most establishments have their patient liaison officers anyway.
Registrant, London

While participants acknowledged that many places where HPC registrants work have a mechanism in place for addressing patient complaints, they also recognised that the HPC is placed in a difficult position because it is obliged to investigate all concerns that are submitted.

As well as pushing back on employers and not allowing them to 'misuse' the HPC to deal with staff issues they should be addressing themselves, some participants

suggested that the HPC could also take a more proactive role in helping those employers that do have ingrained problems with staff to resolve these problems and improve the organisational culture.

HPC needs to be wary of being used as a devolvement of management's responsibilities to sort out a lot of the issues that arise between their staff. Though where there are endemic cultural problems in an organisation – poor training or poor provision of resources – then I believe that the HPC can act as a mediator to identify and advise a department where problems have been flagged up.

Registrant, London

6. Recommendations and next steps

We have compiled the following five recommendations for the HPC on the basis of the findings of this research.

1. **Proceed with a pilot to provide empirical data**

The HPC has already indicated that it is planning a pilot. The diversity of opinion and polarisation of views across participants suggests that it would be useful for the HPC to test the concept of mediation within its regulatory regime by running a pilot. A pilot would provide empirical evidence about the use and value of mediatory processes.

2. **Run a staged pilot which lays the foundation stones for mediation at different points in the fitness to practise process**

As outlined in chapter four, feedback from research participants suggests that the perceived benefits and associated risks are *different* at different points in the fitness to practice process; and that the benefits are perceived as greatest when it is used early in the process. In light of this, we would recommend that any mediation pilot should be designed specifically to examine the benefits and risks of mediation *at each stage* of the fitness to practice process. Given the greater perceived benefits of using mediation early in the fitness to practice process, it may also be worth designing the pilot to look at this stage first. Staged implementation would provide the foundation for subsequent stages and allow learning from early stages to inform the later ones.

In order to gauge the effectiveness of a staged approach, a piece of evaluation work that runs alongside the pilot will be required – a process evaluation that builds the evidence base for mediation and gathers feedback from participants in the process before taking up mediation, on completion of mediation and then again, a couple of months later.

3. **Provide clear messages about the HPC's regulatory regime**

As a regulator the HPC sets standards of practise and then holds registered professionals to those standards. Decisions are required at the strategic level about whether or not greater use of mediation fits within the HPC's regulatory regime. Such decisions about strategic intent are difficult ones to make, but the HPC needs to be clear as an organisation on its rationale and context for mediation in a regulatory regime. If the HPC opts to make greater use of mediation in its regulatory regime, then the organisation must be able to provide clear and consistent messages to external stakeholders (registrants, professional bodies, and members of the public alike) of the reasons why it is encouraging mediation. In this way, the HPC would be conveying its role as regulator in a more dynamic way.

4. **Communicate explicitly about mediation**

As discussed in chapter two, there were varying levels of misunderstanding among participants about the details of the purpose and process of mediation. Consequently, their support and opposition for mediation within the HPC's regulatory regime was based on their own perceptions of what mediation means. This

misunderstanding was further complicated by a lack of understanding of the fitness to practise process. Therefore it will be critical for the HPC to communicate explicitly about what it means by mediation – the processes involved and the objectives that mediation is looking to achieve – and to continue to improve the clarity of communications about the fitness to practise process itself.

5. Consider additional ways to enhance the fitness to practise process

In chapter five we discussed additional mechanisms the HPC may consider in order to improve the fitness to practise process – mechanisms that would lend flexibility to what was perceived as a 'one size fits all' process:

- Investigate offering a two-tier complaints process where there is an advisory service / helpline to provide assistance during the fitness to practise process and also outside of it. This could also offer facilitated dialogue between complainants and registrants that is not intended to reach an agreement but provides an opportunity for each party to express their feelings.
- Look at ways in which to communicate with employers to prevent them misusing the fitness to practise process as a way to deal with internal disciplinary issues.
- Consider taking an advocacy role during the fitness to practise process and provide complainants with opportunities for more direct contact (e.g. face-to-face discussions to talk complainants through the steps in the process).
- Continue to improve communications with complainants during the fitness to practise process.

Appendices

Appendix 1: Invitation to recent complainants

Dear [NAME]

The Health Professions Council (HPC) has recently commissioned Ipsos MORI to conduct a piece of research looking at the use of mediation in the HPC's processes.

I am aware that you made a complaint to the HPC in [DATE].

The HPC is considering whether there might be a place for mediation in the HPC's fitness to practice processes – whether mediation should be offered and where in the processes it might sit. Ipsos MORI's independent research will help the HPC to determine whether mediation would be of any benefit to the regulation that the HPC delivers. We will do this by gathering feedback from past complainants, registrants, members of the public and others with an interest in this area.

I am writing to you to ask whether you would be willing to be included in the group of potential participants from which we will randomly select people to take part in the research.

The research would involve taking part in an in-depth telephone interview with a researcher from Ipsos MORI. It is envisaged that the **interview will last 30-40 minutes** and will cover your experience of HPC's fitness to practice complaints process. In recognition of your contribution and time **we would like to offer you £30 to cover any expenses**.

Ipsos MORI is an independent research organisation, operating according to strict industry codes of practice. **Your answers will be treated in the strictest confidence** unless you specifically wish to be identified. In the report that Ipsos MORI prepares for the HPC, individual responses will be analysed and presented anonymously alongside those of many others.

If you would be willing to take part in this research I would be grateful if you could contact XXX at HPC **to confirm no later than 30 June 2011**. Ipsos MORI will then be in touch with you to arrange a time for an interview that is convenient for you.

We do hope you will participate in an interview, and we look forward to your valued feedback.

Yours sincerely

Kelly Johnson

Director of Fitness to Practise

Appendix 2: Topic guides

Interviews with recent complainants

HPC Research: Discussion Guide for Depth Interviews with Past Complainants
Final version: 11 July 2011

Objectives

- To gather the views of recent past complainants on the potential use of mediation within its regulatory regime.
- To establish whether there is a place for the use of mediation as a regulatory tool in handling certain types of complaints, and if so, where any mediation process may best sit.

Outline of the research programme

- 18 interviews with recent complainants. Complainants may be a member of the public, a registrant or an employer. They have been selected based on their type of case (cases which the HPC believes may be eligible for mediation):
    1. Not about fitness to practise
    2. Referred to a final hearing and case is proven to be well founded
    3. Referred to a final hearing and case is proven not to be well founded
    4. Not referred to a final hearing
- 10 interviews with key stakeholders (these include professional bodies, regulatory bodies, unions, charitable/patient/advocacy organisations)
- 2 discussion groups with members of the public and 2 discussion groups with HPC registered health professionals

Structure of interviews

Section	Notes	Approx timing
1. Introduction	Introduces the research and outlines the 'rules' of the interview.	5 mins
2. Case background	Establishes the matter of the concern, the outcome, and the reasons for satisfaction/dissatisfaction with the outcome.	10 mins
3. Introducing mediation – and how it might have worked in your situation	Explains mediation and investigates whether the participant thinks that mediation would have been appropriate in their specific case or in any case.	10 mins
4. Thinking about the HPC offering mediation in general: Arguments for and against mediation	Challenges the participant by presenting them with the arguments for and against mediation and asks them to make a judgement.	15 mins

5. Closing comments	Recap of the most important issues – advantages and disadvantages.	5 mins

Background information about mediation

The mediator acts in an impartial advisory role, helping the parties to communicate with one another (e.g. to identify their needs, clarify issues, explore solutions and negotiate their own agreement). The mediation model that the HPC may consider using is a 'norm advocating' approach where a representative of the HPC (perhaps a registered professional) would take part in the mediation to ensure that any agreement in the public interest or, in the alternative, that the mediated outcome was agreed subsequently by an HPC panel. This would depend on where in the process mediation is used. If mediation is used prior to the fitness to practise process, then it may not be appropriate for a panel to agree the outcome. However, if mediation is used to potentially reduce the sanction then the HPC envisages that a panel would definitely need to sign off the agreement.

The HPC is clear about the **types of cases that would not be appropriate for mediation**. These include:

- 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.

Discussion Areas	Aim/Notes
1. Introduction	**5 mins**
Introduce self and Ipsos MORI Interview will take approximately 35-45 minutes As you probably know, the Health Professions Council is responsible for protecting the health and wellbeing of people who use the services of registered health professionals. The HPC currently regulates members of 15 different professions. It keeps a register of professionals who meet the standards for training, professional skills and behaviour. The HPC can take action if someone on the register falls below its standards. I understand that you used the HPC to raise a concern about a health professional in the past – is that correct? IF NO: CLOSE INTERVIEW As set out in the letter you received about this research, the HPC is currently exploring whether there is a place for mediation to be used as a regulatory tool in handling certain types of complaints, and if so, where any mediation process	Introduces the research and outlines the 'rules' of the interview (including those we are required to tell them about under MRS and Data Protection Act guidelines). Emphasises that the focus of the interview will be on mediation and whether it could help improve the complaints process.

may best sit. Ipsos MORI has been commissioned by the HPC to speak to past complainants like you, and other stakeholders, to get their views about mediation. I'm interested in what you have to say about this – there are no right or wrong answers. Explain confidentiality and MRS and Data Protection Act guidelines. In the report that Ipsos MORI prepares for the HPC, individual responses will be analysed and presented anonymously alongside those of many others. Ask participant for permission to record. Explain that recording will be only used to help us when it comes to report writing.	
2. Case background	**10 mins**
I'd like to start with discussing your case. Could you please briefly tell me what your concern was about? What was the outcome of the process? How satisfied or dissatisfied were you with that outcome? Why was that? Did you feel as though the issue had been resolved, or did you feel like there was unfinished business? Why/ why not? Are there other ways you would have liked the HPC to deal with your case? [DON'T PROMPT, BUT LOOK FOR THE RESPONDENT SPONTANEOUSLY MENTIONING PROCESSES THAT SOUND LIKE MEDIATION. IF THEY DO MENTION THOSE, EXPLORE WHY THEY RECOMMEND THEM, AND WHAT ADVANTAGES THEY THINK THEY WOULD BRING]	Establishes the matter of the concern, the outcome, and the reasons for satisfaction/dissatisfaction with the outcome.
3. Introducing mediation – and how it might have worked in your situation	**10 mins**
I'd now like to discuss mediation and what it is. Mediation is used to resolve disputes. With the assistance of a neutral and independent mediator, the parties meet face-to-face to identify the disputed issues, develop options, consider alternatives and attempt to reach a mutually acceptable outcome. Mediation is a voluntary process – all parties must agree to take part and are free to leave the process at any time. 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.	Explains mediation and what it involves. Investigates whether the participant thinks that mediation would have been appropriate, or not, in their specific case. Investigates whether they think that mediation would be appropriate in any case, or not.

If both parties agree to meet, then the following steps take place: 1. the mediator explains the structure of the meeting and ask the parties to agree to some basic rules, such as listening without interrupting; 2. each party has 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; 3. the mediator helps 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; 4. the agreement is then recorded and signed by both parties and the mediator. The HPC is thinking that this mediation process could be used in more cases, but the HPC is clear that there are some cases where mediation would never be appropriate. How do you think mediation would have worked in your situation? If the HPC had suggested mediation to you, what would you have thought? Where might mediation have fitted into your situation most effectively (if at all)? What difference do you think it would have made to the outcome/what was actually agreed between you and the person you were complaining about? What difference to you think it would have made to how you were left feeling? What do you think would have been the benefits to you of agreeing to mediation? PROBE FOR: FACE-TO-FACE MEETING, EXPLANATION OR APOLOGY FROM REGISTRANT, CLOSURE, BETTER UNDERSTANDING OF PROCESS What do you think would have been the adverse effects to you of agreeing to mediation? PROBE FOR: LENGTHEN THE PROCESS, …? What difference do you think it would have made to the person you were complaining about? [DON'T PROMPT, BUT LOOK FOR WHETHER THE VIEW IS EXPRESSED THAT THIS IS A "SOFT TOUCH" FOR REGISTRANTS, OR THAT IT MEANS THEY WOULD GET "LET OFF"] Overall, would it have been a good idea, or would it not have been appropriate?	
4. Thinking about the HPC offering mediation in general: Arguments for and against mediation	**15 mins**

THROUGHOUT THIS SECTION, TRY TO PROBE BOTH SIDES OF THE ARGUMENT – THE PROMPTS BELOW GIVE AN INDICATION OF THE AREAS TO COVER, BUT SHOULD BE USED FLEXIBLY We've been talking about how mediation might have worked in your situation. I'd now like to ask what you think about the idea *in general* of the HPC encouraging mediation To what extent to do you think that it is appropriate, or not, for a regulator like HPC to suggest mediation? IF YES, APPROPRIATE: Why do you think it could be helpful if the HPC did more to encourage mediation – what would be the benefits – and to whom? [EXPLORE – they may see different benefits for different stakeholders] At what point in the process do you think it would have been appropriate for the HPC to suggest mediation in your case? Why? Do you think it would always be appropriate for the HPC to suggest mediation? When do you think would it be important for the HPC to suggest mediation? When do you think it would not be appropriate for the HPC to suggest mediation? IF NO, NOT APPROPRIATE: Why not? What do you think would be the problem/disadvantages if the HPC suggested more mediation? Who would lose out most, who would it put at a disadvantage? Would it ever be appropriate for the HPC to suggest mediation? Are there situations where you feel it would be appropriate for the HPC to suggest mediation? What are these? IN THE PRECEDING DISCUSSION, LISTEN OUT FOR UNPROMPTED MENTIONS OF THE FOLLOWING ADVANTAGES AND DISADVANTAGES. IF THESE ARE <u>NOT</u> MENTIONED SPONTANEOUSLY, EXPLORE RESPONDENT VIEWS ON AS MANY OF THEM AS TIME ALLOWS From other research that we have done, some people think	Challenges the participant by presenting them with the arguments for and against mediation and asks them to make a judgement.

that mediation is not appropriate because: - the regulator should be focused on eliminating poor practise rather than resolving disputes; - it is not the regulator's role to make the registrant or the complainant feel better; - it would add more layers to what is already a complicated complaints process; - FOR REGISTRANT OR EMPLOYER INTERVIEWS: in cases where an employer is involved it should be the employer's role to facilitate resolution, and not the HPC's. Others believe that mediation **is** appropriate because: - it fits with the HPC's core role of protecting the health and wellbeing of people who use the services of registered health professionals; - it would reduce the pressure on individuals involved in the complaints process by offering a less formal process; - it would only be offered for a small number of cases. What do you think? Where do you sit on these issues? Why? One of the things that the HPC is responsible for is looking after the wider public interest. Do you think the HPC would be achieving this by suggesting mediation? In what ways do you think suggesting mediation is meeting the wider public interest? If the HPC want to make sure mediation is meeting the public interest, what things would they have to do? PROBE ON: HPC panel sign-off the mediated agreement between the complainant and the registrant; the attendance of a HPC representative (a registered professional) if mediation is used outside of the fitness to practise process; ensure that poor practise is punished.	
5. Closing comments	**5 mins**
If the HPC does decide to go down this route and suggest mediation in more cases, what do you see as the biggest benefits from this? And what are the biggest disadvantages of doing so? Any other comments? As a thank you for taking part, we will send you a cheque for £30. RECORD FULL NAME FOR CHEQUE AND ADDRESS DETAILS FOR SENDING CHEQUE TO	Recap of the most important issues – advantages and disadvantages

Interviews with key stakeholders

HPC Research: Discussion Guide for Depth Interviews with Key Stakeholders Final: 13 July 2011

Objectives

- To gather the views of HPC's key stakeholders on the potential use of mediation within its regulatory regime.
- To establish whether there is a place for the use of mediation as a regulatory tool in handling certain types of complaints, and if so, where any mediation process may best sit.

Outline of the research programme

- 10 interviews with key stakeholders (these include professional bodies, regulatory bodies, unions, charitable/patient/advocacy organisations)
- 18 interviews with recent complainants. Complainants may be a member of the public, a registrant or an employer. They have been selected based on their type of case (cases which the HPC believes may be eligible for mediation):
    5. Not about fitness to practise
    6. Referred to a final hearing and case is proven to be well founded
    7. Referred to a final hearing and case is proven not to be well founded
    8. Not referred to a final hearing
- 2 discussion groups with members of the public and 2 discussion groups with HPC registered health professionals

Structure of interviews

Section	Notes	Approx timing
1. Introduction	Introduces the research and outlines the 'rules' of the interview.	3 mins
2. Understanding of, and general views towards, mediation and fitness to practise processes	Gauges unprompted understanding of mediation and the fitness to practise process before introducing mediation and the fitness to practise process in more detail. Establishes the general, high level views of stakeholders after mediation and the fitness to practise processes are explained.	10 mins
3. Views on mediation in relation to specific case studies	Explores the application of mediation in more detail, supported by case study examples. Aims to discuss two different types of cases as time allows.	10 mins
4. Exploring key areas of interest	Explores three specific issues in more detail: protecting the individuals involved; protecting the public interest; and HPC acceptance of the mediated agreement.	5 mins
5. Closing comments	Recap of the most important issues for HPC to consider.	2 mins

Background information about mediation

The mediator acts in an impartial advisory role, helping the parties to communicate with one another (e.g. to identify their needs, clarify issues, explore solutions and negotiate their own agreement). The mediation model that the HPC may consider using is a 'norm advocating' approach where a representative of the HPC (perhaps a registered professional) would take part in the mediation to ensure that any agreement in the public interest or, in the alternative, that the mediated outcome was agreed subsequently by an HPC panel. This would depend on where in the process mediation is used. If mediation is used prior to the fitness to practise process, then it may not be appropriate for a panel to agree the outcome. However, if mediation is used to potentially reduce the sanction then the HPC envisages that a panel would definitely need to sign off the agreement.

The HPC is clear about the **types of cases that would not be appropriate for mediation**. These include:

- 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.

Discussion Areas	Aim/Notes
1. Introduction	**3 mins**
Introduce self and Ipsos MORI. Interview will take approximately 30 minutes. As you probably know, the Health Professions Council is responsible for protecting the health and wellbeing of people who use the services of registered health professionals. As set out in the letter you received about this research, the HPC is currently exploring whether there is a place for mediation to be used as a regulatory tool in handling certain types of complaints, and if so, where any mediation process may best sit. Ipsos MORI has been commissioned by the HPC to speak to key stakeholders, like you, as well as past complainants, registrants and members of the public, to get their views about mediation. I'm interested in what you have to say about this – there are no right or wrong answers. Explain confidentiality and MRS and Data Protection Act guidelines. In the report that Ipsos MORI prepares for the	Introduces the research and outlines the 'rules' of the interview (including those we are required to tell them about under MRS and Data Protection Act guidelines).

HPC, individual responses will be analysed and presented anonymously alongside those of many others. Anything you say will be kept confidential unless you would like any comments to be attributed to you. Ask participant for permission to record. Explain that recording will be only used to help us when it comes to report writing.	
2. Understanding of, and general views towards, mediation and fitness to practise processes	**10 mins**
I'd like to start with what you think about when you hear HPC talking about suggesting mediation. What do you understand the process of mediation to be? Do you have a sense of where mediation may fit into the HPC's regulatory regime and it's fitness to practise process? Mediation is used to resolve disputes. With the assistance of a neutral and independent mediator, the parties meet face-to-face to identify the disputed issues, develop options, consider alternatives and attempt to reach a mutually acceptable outcome. Mediation is a voluntary process – all parties must agree to take part and are free to leave the process at any time. 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, then the following steps take place: 5. the mediator explains the structure of the meeting and ask the parties to agree to some basic rules, such as listening without interrupting; 6. each party has 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; 7. the mediator helps 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; 8. the agreement is then recorded and signed by both parties and the mediator. The HPC is thinking that this mediation process could be used in more cases, but the HPC is clear that there are some cases where mediation would never be appropriate. I'd like to briefly talk through the steps in the fitness to	Gauges unprompted understanding of mediation and the fitness to practise process before introducing mediation and fitness to practise in more detail. Provides all stakeholders with the same information about mediation and the fitness to practise process to ensure that they all start from the same informed position when giving their views. Establishes the general, high level views of stakeholders towards mediation.

practise process: 1. An allegation is received and given to a case manager. If the case is not about fitness to practise then it is closed. 2. If the case is about fitness to practise, an investigation is carried out. 3. The registered professional is given information and they have 28 days to respond. 4. The case is considered by the Investigating Committee which decides whether there is a case to answer. 5. If the Committee decides there is no case to answer, the case is closed. 6. If there is a case to answer, a final hearing is convened and the panel makes a judgement about whether the case is well founded. If it is well founded, then sanctions are imposed. The HPC is considering whether mediation may have a role in four different types of cases: 1. Cases that are not about fitness to practise (i.e. closed after determined that the case does not reach the standard of acceptance for allegations because for instance, it is not a fitness to practise issue) 2. Cases that are investigated and not referred to final hearing (i.e. no case to answer) 3. Cases that are referred to a final hearing and case is proven to be well founded (i.e. sanctions are imposed) 4. Cases that are referred to a final hearing and case is proven not to be well founded (i.e. no sanctions are imposed) Having heard this explanation about the fitness to practise process and mediation and how they may fit together, do you have any initial comments or reactions? What do you think about the idea in general of the HPC encouraging mediation? What do you consider to be the pros and cons of the HPC suggesting mediation in more cases? NOTE SPECIFIC ARGUMENTS THAT ARE RAISED TO EXPLORE IN MORE DETAIL WITH THE CASE STUDIES	
3. Views on mediation in relation to specific case studies	**10 mins**
I would now like you to consider two scenarios of cases where the HPC may suggest mediation. READ OUT TWO CASE STUDIES: ONE REGISTRANT COMPLAINANT AND ONE PUBLIC COMPLAINANT	Explores the application of mediation in more detail, supported by case study examples. Aims to discuss two

FOR EACH CASE STUDY, EXPLORE THE FOLLOWING AREAS: Do you think it would be appropriate or not for the HPC to suggest mediation in this case? Why? What would be the benefits of suggesting mediation in this case – and to whom? [EXPLORE – they may see different benefits for different stakeholders] What would be the disadvantages of suggesting mediation in this case? Who would lose out most; who would it put at a disadvantage? Are there other situations where you feel it would be appropriate for the HPC to suggest mediation? What are these? IN THE PRECEDING DISCUSSION, LISTEN OUT FOR UNPROMPTED MENTIONS OF THE FOLLOWING ADVANTAGES AND DISADVANTAGES. IF THESE ARE NOT MENTIONED SPONTANEOUSLY, EXPLORE RESPONDENT VIEWS ON AS MANY OF THEM AS TIME ALLOWS From other research that we have done, some people think that mediation is not appropriate because: - the regulator should be focused on eliminating poor practise rather than resolving disputes; - it is not the regulator's role to make the registrant or the complainant feel better; - it would add more layers to what is already a complicated complaints process; - FOR REGISTRANT OR EMPLOYER INTERVIEWS: in cases where an employer is involved it should be the employer's role to facilitate resolution, and not the HPC's. Others believe that mediation **is** appropriate because: - it fits with the HPC's core role of protecting the health and wellbeing of people who use the services of registered health professionals; - it would reduce the pressure on individuals involved in the complaints process by offering a less formal process; - it would only be offered for a small number of cases. What do you think? Where do you sit on these issues? Why?	different types of cases as time allows.
4. Exploring key areas of interest	**5 mins**
<u>Protecting the individuals involved</u> The HPC's current regulatory regime uses the fitness to practise process to ensure that the health and wellbeing of people who use the services of registered health	Explores three specific issues in more detail.

professionals is protected. However, feedback from complainants who have been through the fitness to practise process and a review of literature suggests that mediation could provide a better outcome for both complainants and registrants (e.g. by way of explanation or apology from the registrant, better understanding of the process, closure, learning points, increased satisfaction). Do you think it is the HPC's responsibility to make the complainant and registrant feel better or not? Does it fit within the HPC's remit or not? Why? <u>Protecting the public interest</u> One of the things that the HPC is responsible for is looking after the wider public interest. Do you think the HPC would be achieving this by suggesting mediation? In what ways do you think suggesting mediation is meeting the wider public interest? If the HPC want to make sure mediation is meeting the public interest, what things would they have to do? PROBE ON: sign-off the mediated agreement between the complainant and the registrant; ensure that poor practise is punished; only use in certain cases – which types? <u>Accepting the mediated agreement</u> If the HPC do decide to suggest mediation in more cases, would it be enough that both parties are happy with the outcome? Should the HPC be obliged to assess the mediated agreement and confirm that it is sufficient? What would be required for this? PROBE ON HPC PROPOSALS FOR 'NORM ADVOCATING' MEDIATON: - the attendance of a HPC representative (a registered professional) if mediation is used outside of the fitness to practise process e.g. standard of acceptance is not met; - sign-off by a HPC panel if mediation is used as part of the fitness to practise process e.g. to reduce a sanction. How do you feel about these suggestions? What do you like about them? What are your concerns? Should the HPC be able to take action if it deems that the outcome is not sufficient? In what way?	
5. Closing comments	**5 mins**
If the HPC does decide to go down this route and suggest mediation in more cases, what do you see as the biggest	Recap of the most important issues –

benefits from this? And what are the biggest disadvantages of doing so? Any other comments? CONFIRM HOW SPECIFICALLY THEY WISH THEIR COMMENTS TO BE ATTRIBUTED (I.E. THEMSELVES PERSONALLY, THEIR ORGANISATION OR SECTOR)	advantages and disadvantages

Discussion group with members of the public

Objectives

- To gather the views of HPC's key stakeholders on the potential use of mediation within its regulatory regime.

- To establish whether there is a place for the use of mediation as a regulatory tool in handling certain types of complaints, and if so, where any mediation process may best sit.

Outline of the research programme

- 2 discussion groups with members of the public and 2 discussion groups with HPC registered health professionals

- 18 interviews with recent complainants. Complainants may be a member of the public, a registrant or an employer. They have been selected based on their type of case (cases which the HPC believes may be eligible for mediation):
    9. Not about fitness to practise
    10. Referred to a final hearing and case is proven to be well founded
    11. Referred to a final hearing and case is proven not to be well founded
    12. Not referred to a final hearing

- 10 interviews with key stakeholders (these include professional bodies, regulatory bodies, unions, charitable/patient/advocacy organisations)

Structure of discussion group

Section	Notes	Approx timing
1. Introduction	Introduces the research and outlines the 'rules' of the discussion.	10 mins
2. Introducing the HPC and the fitness to practise process	Introduces the HPC, its core functions and the fitness to practise process.	10 mins
3. Introducing mediation – and where it might fit	Introduces mediation and the key elements in the process. Gauges initial reactions on whether mediation fits within the HPC's regulatory regime	10 mins
4. Views on mediation in relation to specific case studies	Explores the application of mediation in more detail, supported by two or three case study examples.	40 mins
5. Exploring individual vs public interest		15 mins
6. Conclusion and wrapping up	Recap of the most important issues – advantages and disadvantages	5 mins

Background information about mediation

The mediator acts in an impartial advisory role, helping the parties to communicate with one another (e.g. to identify their needs, clarify issues, explore solutions and negotiate their own agreement). The mediation model that the HPC may consider using is a 'norm advocating' approach where a representative of the HPC (perhaps a registered professional) would take part in the mediation to ensure that any agreement in the public interest or, in the alternative, that the mediated outcome was agreed subsequently by an HPC panel. This would depend on where in the process mediation is used. If mediation is used prior to the fitness to practise process, then it may not be appropriate for a panel to agree the outcome. However, if mediation is used to potentially reduce the sanction then the HPC envisages that a panel would definitely need to sign off the agreement.

The HPC is clear about the **types of cases that would not be appropriate for mediation**. These include:

- 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.

Discussion Areas	Aim/Notes
1. Introduction	**10 mins**
Thanks participants for taking part. Introduce self, Ipsos MORI and the aim of the discussion: to discuss the Health Professions Council, it's role in the regulation of health professionals, and whether there is a place for mediation within its regulatory processes. Role of Ipsos MORI – research organisation commissioned by HPC to gather opinions of members of the public, registered health professionals and other key stakeholders. All opinions are valid; disagreements are welcome, but need to be agreeable and respectful. Confidentiality – reassure all respondents that their comments will be anonymous. Participants' names have been given to us in confidence for the purposes of this discussion. Ask permission to digitally record and say report will be published with anonymised quotations. I would like to begin by spending a couple of minutes introducing ourselves. Please could you introduce yourselves to the group by telling us: - your first name; - where you're from;	Introduces the research and outlines the 'rules' of the interview (including those we are required to tell them about under MRS and Data Protection Act guidelines).

- how long you have lived there?	
2. Introducing the HPC and the fitness to practise process	**10 mins**
Have you heard of the Health Professions Council before today? Do you know what it stands for? Do you know what it does? If I said that the HPC is a regulator, what ideas does that conjure up? What does regulation mean to you? BRIEFLY EXPLAIN THE HPC AND ITS ROLE: As you may know, the Health Professions Council is responsible for protecting the health and wellbeing of people who use the services of registered health professionals. The HPC currently regulates 15 different professions and has around 215,000 health professionals on its register. HANDOUT LIST OF PROFESSIONS: This handout shows which professionals are legally obliged to register with the HPC if they would like to use the respective professional title. The HPC can take action against the health professionals that they regulate if the title of a profession is misused, or if professional standards are not being obliged. Now that you've heard a bit about what the HPC does, what are your thoughts/reactions to this? How does that compare with what you thought a regulator might do? EXPLAIN THE HPC'S FITNESS TO PRACTISE ROLE: The HPC is responsible for: - setting standards for professions; - approving courses that meet the standards; - registering people who pass the courses; and - holding those who are registered to its standards. One of the ways in which the HPC holds the health professionals to its standards is through the fitness to practise complaints process. People who have a concern about a health professional's standard of practise can raise this with the HPC who will investigate the matter. The purpose of the Fitness to Practise process is to protect the health and wellbeing of people who use the services of health professionals. HAND OUT DIAGRAM OF FITNESS TO PRACTISE PROCESS. The fitness to practise process involves several steps:	Introduces the HPC, its core functions and the fitness to practise process.

7. An allegation is received and given to a case manager. If the case is not about fitness to practise then it is closed. 8. If the case is about fitness to practise, an investigation is carried out. 9. The registered professional is given information and they have 28 days to respond. 10. The case is considered by the Investigating Committee which decides whether there is a case to answer. 11. If the Committee decides there is no case to answer, the case is closed. 12. If there is a case to answer, a final hearing is convened and the panel makes a judgement about whether the case is well founded. If it is well founded, then sanctions are imposed. What do you think of this process? What do you like/dislike about the process?	
3. Introducing mediation	**10 mins**
The HPC is currently exploring whether it should be suggesting mediation as a way of resolving complaints. Have you heard of mediation before today? What are the key things that are involved in mediation? PROBE: What is the purpose? Who are the parties involved? What is the process of mediation? PROMPT TO ENSURE THAT THE FOLLOWING THINGS ARE INCLUDED: ▪ Mediation is used to resolve disputes. ▪ Neutral and independent mediator, the parties meet face-to-face to identify the disputed issues, develop options, consider alternatives and attempt to reach a mutually acceptable outcome. ▪ Mediation is a voluntary process – all parties must agree to take part and are free to leave the process at any time. ▪ 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, then the following steps take place: 9. the mediator explains the structure of the meeting and ask the parties to agree to some basic rules, such as listening without interrupting;	Introduces mediation and the key elements in the process. Gauges initial reactions on whether mediation fits within the HPC's regulatory regime

10. each party has 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; 11. the mediator helps 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; 12. the agreement is then recorded and signed by both parties and the mediator. What do you think about the idea of mediation? What do you like/dislike about the process? How does mediation compare with the fitness to practise process? Is it better or worse? How? What do you think about the idea of the HPC encouraging mediation to help resolve complaints? What would be the benefits? What would be the disadvantages? EXPLORE FOR DIFFERENT PARTIES INVOLVED Where do you think the HPC could use mediation in the fitness to practise process? PROBE: When a complaint is lodged? After an investigation is carried out? Instead of a final hearing? When a case is closed?	
4. Views on mediation in relation to specific case studies	**40 mins**
I would now like you to different scenarios – examples of real cases that the HPC deals with and where the HPC is thinking that it might be able to suggest mediation. HAND OUT CASE STUDY WHERE A MEMBER OF THE PUBLIC LODGES THE ALLEGATION. READ THROUGH AND THEN DISCUSS THE KEY QUESTIONS FOR EACH CASE. **Scenario Two:** 1. Would it be appropriate or inappropriate for HPC to offer mediation to Kully and Daniel in this scenario? Why or why not? 2. Imagine that you are Kully. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 3. Now imagine that you are Daniel. What are your thoughts/motivations about being offered mediation?	Explores the application of mediation in more detail, supported by case study examples. Aims to discuss at least two case studies where a member of the public lodges the allegation. If time allows, discuss a third case study.

What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 4. If the HPC offered mediation to Kully and Daniel, do you think it would be fulfilling its role as a regulator to ensure the health and well-being of people who use services of Psychologists? Why or why not? 5. If the HPC offered mediation to Kully and Daniel, do you think it would be fulfilling its role as a regulator to act in the public interest and protect the public? Why or why not? **Scenario Three:** 1. Would it be appropriate or inappropriate for HPC to offer mediation to Mawa and Fay in this scenario? Why? 2. Imagine that you are Mawa. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 3. Now imagine that you are Fay. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 4. The Panel has decided that the fitness to practise issues have been addressed by Fay through the Trust's internal disciplinary procedures. If mediation helps Mawa to understand the actions that Fay has taken and feel better about the outcome of the hearing, is it in the public interest for the HPC to offer mediation? **Scenario Five:** 1. Would it be appropriate or inappropriate for HPC to offer mediation to Mohammed and Mrs Hood in this scenario? Why? 2. Imagine that you are Mrs Hood. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance,	

what would need to be "designed in" to the mediation process? 3. Now imagine that you are Mohammed. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 4. Mrs Hood and Mohammed agree to go to mediation, but fail to reach a mutually accepted outcome. What, if anything, should happen next? Are there other solutions for resolving the complaint? 5. Mrs Hood and Mohammed agree to go to mediation, and reach a mutually accepted outcome. Should the HPC have the power to assess the outcome? Should the HPC be obliged to assess the outcome? Should the HPC be able to take action if they deem that the outcome is not sufficient? IN THE CASE STUDY DISCUSSIONS, LISTEN OUT FOR UNPROMPTED MENTIONS OF THE FOLLOWING ADVANTAGES AND DISADVANTAGES. IF THESE ARE NOT MENTIONED SPONTANEOUSLY, EXPLORE PARTICIPANT VIEWS ON AS MANY OF THEM AS TIME ALLOWS. From other research that we have done, some people think that mediation is not appropriate because: - the regulator should be focused on eliminating poor practise rather than resolving disputes; - it is not the regulator's role to make the registrant or the complainant feel better; - it would add more layers to what is already a complicated complaints process; - in cases where an employer is involved it should be the employer's role to facilitate resolution, and not the HPC's. Others believe that mediation **is** appropriate because: - it fits with the HPC's core role of protecting the health and wellbeing of people who use the services of registered health professionals; - it would reduce the pressure on individuals involved in the complaints process by offering a less formal process; - it could provide a better outcome for both complainants and registrants (e.g. by way of explanation or apology from the registrant, better understanding of the process, closure, learning points, increased satisfaction). - it would only be offered for a small number of cases. What do you think? Where do you sit on these issues? Why?	

5. Exploring individual vs public interest	**15 mins**
How do you think mediation looks after the individuals involved in the complaint? (e.g. by way of explanation or apology from the registrant, better understanding of the process, closure, learning points, increased satisfaction). How do you think mediation looks after the wider public interest? (i.e. protect the health and wellbeing of people who use the services of health professionals). Which of these is most important and why? Therefore should the HPC do more or less to encourage mediation?	
6. Conclusion and wrapping up	**5 mins**
To conclude, if the HPC decides to go down this route and suggest mediation in more cases, what would you say is the main benefit and the main disadvantage of doing so? Any other words of advice for the HPC in terms of suggesting mediation in more fitness to practise cases? THANK AND CLOSE	Recap of the most important issues – advantages and disadvantages

Discussion groups with registrants

HPC Research: Discussion Guide for Groups with Registered Professionals
Final: 13 July 2011

Objectives

- To gather the views of HPC's key stakeholders on the potential use of mediation within its regulatory regime.

- To establish whether there is a place for the use of mediation as a regulatory tool in handling certain types of complaints, and if so, where any mediation process may best sit.

Outline of the research programme

- 2 discussion groups with members of the public and 2 discussion groups with HPC registered health professionals

- 18 interviews with recent complainants. Complainants may be a member of the public, a registrant or an employer. They have been selected based on their type of case (cases which the HPC believes may be eligible for mediation):
    13. Not about fitness to practise
    14. Referred to a final hearing and case is proven to be well founded
    15. Referred to a final hearing and case is proven not to be well founded
    16. Not referred to a final hearing

- 10 interviews with key stakeholders (these include professional bodies, regulatory bodies, unions, charitable/patient/advocacy organisations)

Structure of discussion group

Section	Notes	Approx timing
1. Introduction	Introduces the research and outlines the 'rules' of the discussion.	10 mins
2. Introducing the HPC and the fitness to practise process	Introduces the HPC, its core functions and the fitness to practise process.	10 mins
3. Introducing mediation – and where it might fit	Introduces mediation and the key elements in the process. Gauges initial reactions on whether mediation fits within the HPC's regulatory regime.	10 mins
4. Views on mediation in relation to specific case studies	Explores the application of mediation in more detail, supported by two or three case study examples.	40 mins
5. Exploring key areas of interest	Looks in more detail at views towards protecting the individuals involved and protecting the wider public interest.	15 mins
6. Conclusion and wrapping up	Recap of the most important issues – advantages and disadvantages.	5 mins

Background information about mediation

The mediator acts in an impartial advisory role, helping the parties to communicate with one another (e.g. to identify their needs, clarify issues, explore solutions and negotiate their own agreement). The mediation model that the HPC may consider using is a 'norm advocating' approach where a representative of the HPC (perhaps a registered professional) would take part in the mediation to ensure that any agreement in the public interest or, in the alternative, that the mediated outcome was agreed subsequently by an HPC panel. This would depend on where in the process mediation is used. If mediation is used prior to the fitness to practise process, then it may not be appropriate for a panel to agree the outcome. However, if mediation is used to potentially reduce the sanction then the HPC envisages that a panel would definitely need to sign off the agreement.

The HPC is clear about the **types of cases that would not be appropriate for mediation**. These include:

- 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.

Discussion Areas	Aim/Notes
1. Introduction	**10 mins**
Thanks participants for taking part. Introduce self, Ipsos MORI and the aim of the discussion. This research is being conducted on behalf of the Health Professions Council. They are interested in whether there is a place for the use of mediation as a regulatory tool in handling certain types of complaints, and if so, where any mediation process may best sit. Role of Ipsos MORI – research organisation commissioned by HPC to gather opinions of registered health professionals, members of the public and other key stakeholders. All opinions are valid; disagreements are welcome, but need to be agreeable and respectful. Confidentiality – reassure all respondents that their comments will be anonymous. Anything which you have said will be kept confidential – i.e. it will not be attributed to you, nor will we divulge who has actually taken part (though the original list of potential participants was provided to Ipsos MORI by HPC). Ask permission to digitally record and say report will be published with anonymised quotations.	Introduces the research and outlines the 'rules' of the interview (including those we are required to tell them about under MRS and Data Protection Act guidelines).

I would like to begin by spending a couple of minutes introducing ourselves. Please could you introduce yourselves to the group by telling us: - your first name; - where you're from; - in what profession you practice; - whether NHS or private, or both; - and for how long you have been practising?	
2. Introducing the HPC and the fitness to practise process	**10 mins**
As you probably know, the Health Professions Council is responsible for protecting the health and wellbeing of people who use the services of registered health professionals. Start with thinking about the HPC in general. What are the main purposes and goals of the HPC? WRITE UP ON FLIP CHART How well would you say you know the HPC and its role? What does the HPC do well? What does it not do so well? IF THE FOLLOWING IS NOT COVERED IN PRECEDING DISCUSSION, ADD TO FLIP CHART The HPC's remit is to: - set standards for professions; - approve courses that meet the standards; - register those who pass the courses; and - hold those who are registered to its standards. Now let's focus on the fitness to practise process. What is this? What steps does it involve? What is the purpose of this process? HAND OUT DIAGRAM OF FITNESS TO PRACTISE PROCESS. The purpose of the Fitness to Practise process is to protect the health and wellbeing of people who use the services of health professionals. I'd like to briefly talk through the steps in the fitness to practise process: 13. An allegation is received and given to a case manager. If the case is not about fitness to practise then it is closed. 14. If the case is about fitness to practise, an investigation is carried out. 15. The registered professional is given information and they have 28 days to respond.	Introduces the HPC, its core functions and the fitness to practise process.

16. The case is considered by the Investigating Committee which decides whether there is a case to answer. 17. If the Committee decides there is no case to answer, the case is closed. 18. If there is a case to answer, a final hearing is convened and the panel makes a judgement about whether the case is well founded. If it is well founded, then sanctions are imposed.	
3. Introducing mediation	**10 mins**
The HPC is currently exploring whether it should be suggesting mediation as a way of resolving complaints. What do you understand the process of mediation to be? What are the key elements? PROMPT TO ENSURE THAT THE FOLLOWING THINGS ARE INCLUDED: ▪ Mediation is used to resolve disputes. ▪ Neutral and independent mediator, the parties meet face-to-face to identify the disputed issues, develop options, consider alternatives and attempt to reach a mutually acceptable outcome. ▪ Mediation is a voluntary process – all parties must agree to take part and are free to leave the process at any time. ▪ 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, then the following steps take place: 13. the mediator explains the structure of the meeting and ask the parties to agree to some basic rules, such as listening without interrupting; 14. each party has 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; 15. the mediator helps 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; 16. the agreement is then recorded and signed by both parties and the mediator. Do you have a sense of where mediation may fit into the HPC's regulatory regime and it's fitness to practise process?	Introduces mediation and the key elements in the process. Gauges initial reactions on whether mediation fits within the HPC's regulatory regime

What do you think about the idea in general of the HPC encouraging mediation? What do you consider to be the pros and cons of the HPC suggesting mediation in more cases?	
4. Views on mediation in relation to specific case studies	**40 mins**
I would now like you to consider a scenario of a case where the HPC may suggest mediation. HAND OUT CASE STUDY WHERE A REGISTRANT LODGES THE ALLEGATION. READ THROUGH AND THEN DISCUSS THE KEY QUESTIONS FOR EACH CASE. **Scenario One:** 6. Would it be appropriate or inappropriate for HPC to offer mediation to Helen and Anne in this scenario? Why? 7. Imagine that you are Anne. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 8. Now imagine that you are Helen. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? **Scenario Five:** 1. Is it appropriate or inappropriate for HPC to offer mediation to Ali and Simone in this scenario? Why? Why not? 2. Imagine that you are Ali. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 3. Now imagine that you are Simone. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation?	Explores the application of mediation in more detail, supported by case study examples. Aims to discuss at least two case studies where a registrant lodges the allegation. If time allows, discuss a third case study.

What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 4. Ali and Simone agree to go to mediation, but fail to reach a mutually accepted outcome. How would this impact on the sanctions imposed? 5. Ali and Simone agree to go to mediation, and reach a mutually accepted outcome. Should the HPC be able/obliged to assess whether outcome is sufficient? Why/why not? If the HPC accepts the outcome of Ali and Simone's mediation, how would this impact on the sanctions imposed? **Scenario Six:** 6. Would it be appropriate or inappropriate for HPC to offer mediation to NHS Enterprise and Leon in this scenario? Why or why not? 7. Imagine that you are NHS Enterprise. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 8. Now imagine that you are Leon. What are your thoughts/motivations about being offered mediation? What are the benefits for you in agreeing to mediation? What are the adverse effects for you in agreeing to mediation? For you to accept mediation in this instance, what would need to be "designed in" to the mediation process? 9. NHS Enterprise and Leon agree to go to mediation, but fail to reach a mutually accepted outcome. What, if anything, should happen next? Are there other solutions for resolving the complaint? 10. Is there a role, or not, for the HPC to resolve staff management and relations issues that NHS Enterprise has? Why? Does it help to protect the public? 11. NHS Enterprise and Leon agree to go to mediation, and reach a mutually accepted outcome. Should the HPC have the ability to accept or reject the outcome? Should the HPC be able to take action if they deem that the outcome is not sufficient? In what way? IN THE CASE STUDY DISCUSSIONS, LISTEN OUT FOR	

UNPROMPTED MENTIONS OF THE FOLLOWING ADVANTAGES AND DISADVANTAGES. IF THESE ARE NOT MENTIONED SPONTANEOUSLY, EXPLORE PARTICIPANT VIEWS ON AS MANY OF THEM AS TIME ALLOWS. From other research that we have done, some people think that mediation is not appropriate because: - the regulator should be focused on eliminating poor practise rather than resolving disputes; - it is not the regulator's role to make the registrant or the complainant feel better; - it would add more layers to what is already a complicated complaints process; - in cases where an employer is involved it should be the employer's role to facilitate resolution, and not the HPC's. Others believe that mediation **is** appropriate because: - it fits with the HPC's core role of protecting the health and wellbeing of people who use the services of registered health professionals; - it would reduce the pressure on individuals involved in the complaints process by offering a less formal process; - it could provide a better outcome for both complainants and registrants (e.g. by way of explanation or apology from the registrant, better understanding of the process, closure, learning points, increased satisfaction). - it would only be offered for a small number of cases. What do you think? Where do you sit on these issues? Why?	
5. Exploring key areas of interest	**15 mins**
<u>Protecting the individuals involved</u> Mediation could provide a better outcome for both complainants and registrants (e.g. by way of explanation or apology from the registrant, better understanding of the process, closure, learning points, increased satisfaction). Do you think it is the HPC's responsibility to make the complainant and registrant feel better or not? Does it fit within their remit or not? Why? <u>Protecting the public interest</u> One of the things that the HPC is responsible for is looking after the wider public interest. Do you think the HPC would be achieving this by suggesting mediation? In what ways do you think suggesting mediation is meeting the wider public interest? If the HPC want to make sure mediation is meeting the public interest, what things would they have to do? PROBE ON:	Looks in more detail at views towards protecting the individuals involved and protecting the wider public interest.

sign-off the mediated agreement between the complainant and the registrant; the attendance of a HPC representative (a registered professional) if mediation is used outside of the fitness to practise process; ensure that poor practise is punished; only use in certain cases – which types? EXPLORE HPC PROPOSALS FOR 'NORM ADVOCATING' MEDIATON: - the attendance of a HPC representative (a registered professional) if mediation is used outside of the fitness to practise process e.g. standard of acceptance is not met; - sign-off by a HPC panel if mediation is used as part of the fitness to practise process e.g. to reduce a sanction. How do you feel about these suggestions? What do you like about them? What are your concerns?	
6. Conclusion and wrapping up	**5 mins**
To conclude, if the HPC decides to go down this route and suggest mediation in more cases, what would you say are the main benefit and the main disadvantage of doing so? Any other words of advice for the HPC in terms of suggesting mediation in more fitness to practise cases? THANK AND CLOSE	Recap of the most important issues – advantages and disadvantages

JUDICIAL COLLEGE

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A NEW START

Jeremy Cooper **considers the significance to the tribunals judiciary of a single Judicial College.**

In October 2010, the Lord Chief Justice and the Senior President of Tribunals resolved that the Judicial Studies Board and the resources for judicial training in the Tribunals Service should be combined to create a single judicial training organisation. The impetus driving this decision was a commitment on both sides to ensure that the training of all those who exercise judicial functions, whether it be in court or tribunals, is of a uniformly high and exacting standard and also to enable best practice to be widely shared and disseminated.

The new organisation is named the Judicial College and came into being on 1 April 2011 to coincide with the creation of the newly integrated courts and tribunals service (the HMCTS). From that date the Judicial Studies Board ceased to exist. Overall responsibility for leading the development of the new Judicial College is vested in the college's governing board, chaired by Lady Justice Hallett. The Judicial College will organise training for judicial office-holders (judges and members) in the UK who come under the leadership of the Lord Chief Justice or Senior President of Tribunals, which includes not only judges in England and Wales but judges and members of reserved tribunal jurisdictions in Scotland and Northern Ireland.

Both courts and tribunals have much to offer and to learn from each other in the training field and courts and tribunals will be equally represented on the Board. This fact alone should send out a strong message that this is a partnership between the courts and tribunals that cannot be dominated by one side of the equation. In particular the specialist skills of tribunal members will be robustly recognised and preserved under the new training arrangements.

The initial membership of the Board is as follows:

Lady Justice Hallett DBE; Mr Justice Owen; Mrs Justice Thirlwall; Judge Nicholas Warren; Judge John Phillips CBE, Director of Studies for the Courts' Judiciary; Professor Jeremy Cooper, Director of Studies for Tribunals; the Executive Director of the Judicial College.

Continued page 7

Editorial

Two of the characteristic features of tribunals are their accessibility and adoption of an enabling role. A key aspect of ensuring accessibility and promotion of an enabling role involves permitting the appellant to present their case in the best possible way. We do this by being expert, user-friendly – and by employing our case management powers and the overriding objective.

But how interventionist should a tribunal be? Approaches vary between jurisdictions, and characterising a tribunal's approach methods and style as either inquisitorial and adversarial can be overly simplistic and unhelpful. The approach depends on the nature of the case, the issues which are raised, and on the attributes of parties before the tribunal. The issue is brought into focus particularly when one party lacks legal representation.

We are pleased to include three articles touching on aspects of this issue: a series of practical tips (page 2), consideration of the jurisprudence of the higher courts (page 4) and a review of a recent book on this topic (page 8).

Finally, I would like to take the opportunity to welcome you to the new Judicial College, under whose auspices the journal is now published.

Kenny Mullan

Please send comments on the journal to *publications@judiciary.gsi.gov.uk*.

From intervention to interfering

Leslie Cuthbert builds on the advice of previous articles on the particular need for a tribunal to be active, interventionist and enabling when one party is unrepresented or when their representation is poor.

In *Mongan v Department for Social Development*,[1] Kerr LCJ noted that: 'A poorly represented party should not be placed at any greater disadvantage than an unrepresented party' and that 'close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation'. In previous articles in this journal,[2] the authors also highlighted the importance of proper preparation, effective case management and a focus on the overriding objective.

Inquisitorial questioning

This is a difficult area and the proper procedure will vary depending on the particular case and the jurisdiction in which it is being heard. (On page 4 of this issue, Julia O'Hara considers the finely balanced role that a tribunal must play in dealing with the unexpected.)

It is incumbent upon tribunals to explore how any concessions have been reached.

It is worth noting here that the labels inquisitorial and adversarial can be misleading – few tribunals are simply one or the other and much depends on the subject matter and the particular case. Generally speaking, most tribunals take an inquisitorial approach. Those tending more to the adversarial include the Lands Chamber of the Upper Tribunal, the Immigration and Asylum Chamber, the Road User Charging Adjudication Tribunal and the Employment Tribunal, although views may differ even between judges in the same jurisdiction.

However, the message from Kerr LCJ's comments seems to be that it is part of the role of tribunals to be interventionist and to explore issues that might be relevant and have been overlooked as the result of a lack of proper representation.

Probing – issues and evidence

There may be a fine line to be drawn, however, between interventionist and interfering and a tribunal should exercise caution in initiating new arguments or propositions. In *Muschett v Prison Service*,[3] Rimer LJ sounded this word of warning:

> '[A]n employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena.'

The distinction would appear to lie between inquiring into an issue which is clear from the evidence, and which anyone with knowledge of the tribunal would raise, rather than going through all *possible* arguments that a party might put forward or taking over the case for one party or the other.

A tribunal is in a position, however, to be more probing in exploring the evidence before it in order to make a determination to the requisite standard of proof. Once the tribunal has the evidence to enable it to make its determination as to the validity of the assertion, it may stop its queries. If, for example, an argument is put forward by one party with no supporting evidence, it may be proper to probe the evidence to uncover any facts which may support the proposition.

Timing is an important factor in these matters. While a tribunal is not to be encouraged to raise new issues during the course of a hearing – and certainly not at the end of a case after the evidence has been heard – the process of clarifying the issues at a case management discussion or at the start of the hearing might identify additional or separate arguments.

Poor representation

Mr Justice Hickinbottom recently wrote:[4]

> 'Advocates may be inexperienced, or simply poor. A judge needs to have a temperament such that he is never seen to lose his temper, even in the face of ineptitude or ignorance of those before him.'

Remaining calm and non-judgmental is the order of the day. Tribunals may wish to wait until both parties have asked questions, or made submissions about an issue, before beginning to explore the subject themselves. In the First-tier Tribunal (Mental Health), some panels allow the patient's representative to ask their questions before the panel asks its own.

There are some advantages to this approach:

- It allows the panel the opportunity to assess the effectiveness of the representative and adjust its questioning accordingly.
- If the representative is effective, it helps the panel to focus on the issues in dispute.

This approach also has validity in a more adversarial setting.

Concessions

It is incumbent upon tribunals to explore how any concessions have been reached. A party may be oblivious to the concession they are making, and the tribunal should check that both parties understand the consequences. If the panel is not satisfied there has been a 'meeting of minds', it can request evidence on the point.

Level playing field

Finally, the following points are a useful checklist in ensuring a level playing field, particularly where one party is unrepresented, or does not attend.

- Appropriate and effective case management.
- A simple, clear and thorough introduction.
- Using basic language and explaining technical terms.
- Avoiding making assumptions based on knowledge or experience.
- Consider each issue to be decided from each party's perspective.
- Attentive listening – where you are focused on what the other person is saying, or essential listening – where you are more focused on what the other person is saying than on yourself, understanding the essence of what they are saying.

Conclusion

The overriding objective of the procedure rules – 'to enable the tribunal to deal with cases fairly and justly' – gives a tribunal a large degree of scope in how to manage a hearing. As long as a tribunal does not act outside its discretion – including by not doing something it should have done – there is a great deal that can be done to meet the various challenges inherent in dealing with both unrepresented and poorly represented parties.

Leslie Cuthbert sits on the First-tier Tribunal (Mental Health) and Road User Charging Adjudication Tribunal.

[1] [2005] NICA 16.

[2] 'The more preparation the better', *Tribunals*, winter 2010, Martin Williams. 'Walking a tightrope to a solution', *Tribunals*, summer 2009, Melanie Lewis.

[3] [2010] EWCA Civ 25.

[4] 'What Makes a Good Judge', *Judicial Appointments, Balancing Independence, Accountability and Legitimacy*, www.judicialappointments.gov.uk/static/documents/JA_web.pdf.

How to handle tales of the UNEXPECTED

In a tribunal that is intended to be informal and where many parties appear unrepresented, what is the appropriate response to an unexpected point? *Julia O'Hara* offers advice.

In *Peifer v Castlederg High School* [2008] NICA 49, Lord Justice Girvan said:

> 'Tribunals should not be discouraged from exercising proper control of proceedings to secure those objectives through fear of being criticised by a higher court which must itself give proper respect to the tribunal's margin of appreciation in the exercise of its powers in relation to the proper management of the proceedings to ensure justice, expedition and the saving of cost.'

But what are the powers of a tribunal judge to deal with unexpected points under their procedural rules and, in particular, the overriding objective?

Unexpected points can appear in various ways:

- A point not being identified in pre-hearing documents.
- Questions asked during a hearing that raise different legal issues from those disclosed in the pleadings.
- The tribunal identifying an issue which the parties have not raised.
- Issues becoming apparent to the panel making a decision after the hearing has concluded.

Overriding objective

Procedural rules are chamber-specific and each jurisdiction has its own version of the overriding objective. For example, the duty to ensure that the parties are on an equal footing is absent from the rules of the Social Entitlement Chamber of the First-tier Tribunal, a fact presumably intended to reflect the 'citizen v state' nature of the hearing. The Employment Tribunal's procedure rules provide significant flexibility to manage unexpected points, as will be seen below.

Nature of proceedings

Where an unexpected point arises, the nature of the proceedings – adversarial or inquisitorial – may affect the response. One clear statement of what the terms mean is:

> 'The basic idea underlying the adversarial system is that the truth is best discovered by allowing parties who allege conflicting versions of what happened (or of what the law is) each to present, in its strongest possible form, their own version of the truth, and leave to an impartial third party to decide which version more nearly approximates to the truth. An inquisitorial system depends much more on the third party making investigations and, by questioning each of the parties and other relevant persons, deciding where the truth lies.'[1]

Inquisitorial

Referring to the process of benefits adjudication – which she described as a 'cooperative process of investigation' between claimants and decision makers – Baroness Hale commented in the House of Lords decision in *Kerr v Department for Social Development* [2004] UKHL 23:

> '. . . it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof.'

This is not to say that each party in a hearing before this tribunal does not have to prove

matters relevant to the decision. Baroness Hale was referring to the inquisitorial nature of decision-making at the benefit entitlement stage. Appeals from decisions made by departmental decision makers lie to the Social Entitlement Chamber of the First-tier Tribunal. In hearings before this tribunal, depending on the issues in any given appeal, both sides need to prove the elements of their case although the tribunal may take a more active role in eliciting relevant information from witnesses and documents. The rules of procedure in this jurisdiction also provide extensive case management powers to the tribunal to identify the issues on which it requires evidence and strike out claims with no reasonable prospect of success. This type of tribunal is therefore a mixture of inquisitorial and adversarial.

Natural justice

Common to all jurisdictions are rules governing procedure, such as the rules of natural justice and Article 6. The rules of natural justice include two main principles, the rule against bias and the fair hearing rule.

The natural justice safeguards of a fair hearing include:

- Notification of time, date, place of hearing.
- Adequate time to prepare one's case in answer.
- Access to all materials relevant to one's case orally or in writing or both.
- A right to examine and cross-examine witnesses.
- A right to have the decision based solely on material which has been available to (and answerable by) the parties.
- A right to a reasoned decision which takes proper account of the evidence and addresses parties' arguments.

They can also include a right to be represented, possibly by a lawyer.

Aware

So, a fair hearing is one where each side is aware of the principal allegations or claims made by the other and has a reasonable opportunity of meeting them. This can mean allowing amendments to claims and responses as well as adjournments to give parties the opportunity to investigate issues of which they have not received notice. At the beginning of or during a hearing it may become apparent that one party is raising a new point. If it was not in the pleaded case, it can still be considered. The problem was described thus by Mr Justice Langstaff in *Ministry of Defence v Hay* [2007] IRLR 928:

> 'It cannot, however, be the case that a party's contentions are frozen artificially yet definitively at some time prior to the hearing. Thus the rules make provision for the amendment of an originating application or, as the case may be, a defence to it. It is often desirable for the sake of clarity that there should be a formal amendment . . .'

Article 6

Article 6 is an increasingly important source of procedural norms. One of the features inherent in the concept of a fair trial is the existence of a judicial process which requires each side to have the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the opposing party. As stated by the European Court of Human Rights:

> 'The effect of Article 6(1) is, *inter alia*, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision.'

Commissioner Jacobs preferred to explain a decision on a procedural ground of appeal in terms of the claimant's Convention right to a fair trial. He made the observation that while tribunals may be familiar with the principles of

natural justice, he found that, increasingly, they were not applying them.

> 'I could, no doubt, have reached the same conclusion under domestic principles of natural justice. However, the Human Rights Act 1998 provides a convenient opportunity for Commissioners to rebase their decisions on procedural fairness in fresh terms. In my view, this would be desirable . . . The introduction of the language of balance would provide a touchstone for tribunals.'

New point

When a new point comes up, the tribunal will need to consider whether to give the parties the chance to deal with it. In practical terms, the later the point emerges the more difficult this will be. Lady Justice Smith spoke about the failure by an Employment Tribunal to give the parties the opportunity to make representations about a finding of fact for which neither party had contended:

> '. . . the giving of such an opportunity is not an invariable requirement. The Employment Tribunals Regulations give the employment tribunal very wide discretion on procedural matters which is wide enough to encompass a decision as to the appropriate course to take where this kind of situation arises. In any event, if the legal effect of the findings of fact that are to be made is obviously and unarguably clear, no injustice will be done if the decision is promulgated without giving that opportunity. Even if an opportunity should have been given and was not, an appellate court will set aside the decision only if the lower court's application of the law was wrong.' [2]

An appeal against a tribunal decision on a procedural matter will only succeed if the appellate court finds that the tribunal exercised its discretion wrongly.

Good practice requires identification of the issues for determination before the hearing begins and checking with the parties and representatives that they agree with those identified by the tribunal. Rule 14 of the Employment Tribunal's procedural rules gives the panel a discretion to make such enquiries of parties and witnesses as it consider appropriate and otherwise conduct the hearing in such a manner as it considers appropriate for the clarification of the issues and just handling of the proceedings. This provides a certain amount of inquisitorial leeway in an essentially adversarial tribunal determining disputes between two parties. Other tribunals can identify their issues by reference to the possible outcomes of a hearing.

In hearings before the SSCS tribunals, presenting officers rarely attend. This can create a practical problem for tribunals if a new point emerges during the hearing. The extent to which natural justice requires an adjournment in these circumstances may be balanced with the decison by the department not to send a presenting officer and the overriding objective to deal with the case proportionately and avoid delay.

Artificially truncating

Judgments enlarging or constricting the issues are another example of the exercise of a discretion to which the rules referred to above apply. In a race discrimination case, Lord Justice Sedley said this:

> 'Employment Tribunals need to bear in mind that in carrying out their useful role of defining the issues in complicated cases in advance of the hearing they must avoid setting limits which artificially truncate a necessary narrative, a very different exercise from the one of cutting out things that are irrelevant or legally inadmissible.' [3]

Here, the claimant was represented by a pupil barrister who had conceded a time point at a

pre-hearing review. The Employment Tribunal dismissed the claim. The EAT allowed an appeal but the Court of Appeal, with some regret, upheld the tribunal decision. Lord Justice Mummery expressed surprise that the tribunal had not allowed an amendment to the originating application or exercised its discretion to extend time on the just and equitable grounds in the Race Relations Act, as it then was. Facts helpful to the claimant had not been pleaded but were included in the claimant's witness statement. According to Lord Justice Mummery, those facts showed that the claimant '. . . may have had a good case'. He emphasised the very wide and f lexible jurisdiction to do justice in the case, as contained in the Employment Tribunal's procedural rules.

Representation

In its proposals for the reform of legal aid, the Government maintains that legal aid for advocacy before most tribunals is 'not justified given the ease of accessing a tribunal, and the user-friendly nature of the procedure'.

Judicial colleagues are acutely aware that the absence, presence and quality of legal representation can have an impact on the conduct of a hearing. Where a party has the benefit of effective representation, the task of the tribunal in identifying the issues in the case and dealing with unexpected points by way of amendment or adjournment can be facilitated. Conversely, without such representation, the tribunal will need to make a careful judgment about the level of user friendliness with which they feel it appropriate to engage.

Conclusion

An appeal against a tribunal decision on a procedural matter will only succeed if the appellate court finds that the tribunal exercised its discretion wrongly. Much of the case law on procedural issues shows that the appellate courts give tribunals a wide margin of appreciation in these types of issues. Ultimately, if tribunals show in judgments on procedural points that they have taken all relevant factors into account, fully explain the reasons why they allowed or refused an amendment or adjournment, refer to the overriding objective and demonstrate sound judgment in the outcome they will be exercising their discretion appropriately.

Julia O'Hara sits on the First-tier Tribunal (Social Entitlement Chamber) and the Employment Tribunal and teaches at Sheffield University.

[1] Administrative Law, Peter Cane (4th ed, Clarendon Law Series).
[2] *Judge v Crown Leisure Ltd* [2005] IRLR 823.
[3] *Ahuja v Inghams* [2002] ICR 1485.

Continued from page 1

In its first year, the college will focus on ensuring that training promised in the JSB and tribunals training programmes for 2011–12 will be delivered in the usual way. But the college will also be looking at ways in which best practice can be shared, different training methods can be pioneered and extended and (where appropriate) judicial skills training might be delivered across jurisdictional boundaries.

An exploration of the greater use of e-learning, and a concentration on the development of a lifelong learning strategy for individual judges and tribunal members to match their professional career development need also to figure high on the college agenda. The development of a working relationship with those tribunals outside the HMCTS will also be given priority. In the longer term, the desirability, practicalities and affordability of establishing a permanent home for the college will also need to be carefully explored.

Judicial College

Professor Jeremy Cooper sits on the First-tier Tribunal (Mental Health) and is Director of Studies for Tribunals Judiciary at the Judicial College.

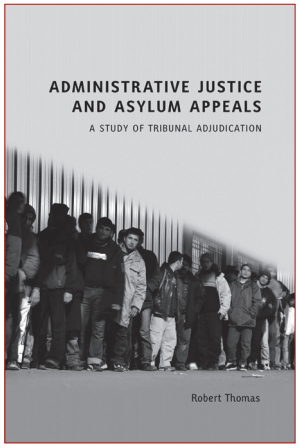
A comprehensive guide full of INSIGHT

In his new book, Robert Thomas considers the persistent controversy in the way judges should go about eliciting evidence on which to base findings of credibility and fact. *Richard McKee* describes why he found the book so interesting and useful.

This is a dense book (or perhaps that epithet could more aptly be applied to the reviewer). What I mean is, the book is densely packed with information, interest and insight. The interest will principally be for people working in the asylum field, since the whole phenomenon – from the initial assessment of asylum claims by the Home Office (now the UK Borders Agency), through the two-tier system of statutory appeals, and on to further appeals in the higher courts and collateral challenges by way of judicial review – is thoroughly and accurately described. But it is interesting also as an example of how one part – admittedly, a rather unusual part – of the unified Tribunals Service fits into the broad scheme of administrative justice as it has developed since the Franks Committee.

'Judicial family'

The principal insight for me was Dr Thomas's contention that the system for providing administrative justice is not to be regarded as aligned exclusively with the judicial member of the triad formed by the traditional 'separation of powers': the legislature, the executive and the judiciary. Of course, the Tribunals Service is independent of the government departments from which its various chambers originally sprang. The recent attribution of the title 'judge' to the legally qualified members of tribunals has enhanced their status, while the merger of Her Majesty's Courts Service with the administration of the Tribunals Service has further blurred the distinction between the ordinary courts and the tribunals. The designation of the Upper Tribunal as a superior court of record, to which judicial reviews may be transferred from the High Court, and on which judges of the High Court and Court of Appeal are now regularly sitting, reinforces the notion that we are all now one big 'judicial family'.



Administrative Justice and Asylum Appeals: A study of tribunal adjudication by Robert Thomas, Hart Publishing (Oxford 2011)

Making policy

None of that detracts, however, from Dr Thomas's point that the tribunals which dispense administrative justice are not like the civil courts, in which the judges are the impartial umpires in disputes between parties, or the criminal courts, in which innocence is established or guilt punished. Rather, the tribunals are themselves engaged in implementing government policy, and sometimes even make policy themselves. Thus, it is government policy that the United Kingdom should carry out its obligations under international treaties to afford protection to those who have a well-founded fear of persecution in their own countries. The function of the Immigration and Asylum Chambers of the First-tier and Upper Tribunals is to help carry out those obligations by determining whether asylum seekers who complain that they have been wrongly refused refugee or similar status are indeed entitled to it. An example of how the tribunal might itself effect policy changes may be seen in the development of 'country guidance' by the Upper Tribunal. By this method, appeals are heard in which copious evidence is adduced concerning particular categories of asylum seeker in

particular countries. By identifying 'risk categories' and 'risk factors', the tribunal influences the way in which initial applications are assessed by the Border Agency of the Home Office, which in turn affects refugee flows into the United Kingdom.

Quality

A nagging question for Dr Thomas is how to evaluate the quality of administrative justice in the context of asylum. How does one know whether the 'right' decision has been made in an asylum appeal? If an appellant has been successful despite having fabricated his claim, that is unlikely ever to come to light. If he is unsuccessful and is returned to his own country (not an inevitable consequence of failure, as the ratio of removals to dismissed appeals is low), we are unlikely to hear if he comes to any harm.

'Front loading'

Implementation of the policy of giving refuge to genuine asylum seekers generates inevitable tensions. There are limited resources with which to achieve this aim. How are they to be deployed? Every so often, like re-invention of the wheel, the notion of 'front loading' comes back into fashion. That means devoting more effort to Home Office caseworkers making good decisions on initial applications. It is said that asylum seekers whose claims are rejected for good reasons will be less likely to appeal to the First-tier Tribunal. But as Dr Thomas observes, they have nothing to lose by appealing. They will be legally aided (asylum will remain 'in scope' when the axe falls on legal aid) provided they pass the merits test, and indeed there is a very high level of appeals both against initial decisions by the Home Office, and against decisions of the First-tier Tribunal. Onward challenges in the asylum jurisdiction dwarf anything else in the Tribunals Service.

Research

Dr Thomas spent two years conducting empirical research at hearing centres of the Asylum and Immigration Tribunal (as it was before it joined the Tribunals Service in February 2010), interviewing judges, representatives, Home Office Presenting Officers, interpreters, tribunal staff, expert witnesses and other stakeholders (as we must now call them), as well as observing numerous appeal hearings and reading numerous determinations. He gained unprecedented access to the workings of the tribunal, and this has given him an insight of remarkable depth into its processes and problems. Just a few of those can be mentioned here.

Credibility

How, for example, is credibility to be assessed? It is notorious that asylum seekers often do not have any documentary evidence to back up their claim, but when they do, the reliability of those documents may be suspect. Consistency is regularly correlated with credibility, but it is trite that a basically truthful story may be told in a different way at different times, whereas a well-rehearsed liar may be able to tell an untruthful story with a lack of hesitation or deviation worthy of the BBC Radio 4 programme *Just A Minute* (it will have to be repeated, of course). Medical evidence may be adduced in support of the appellant's claim, but the scars described by the doctor may not have been caused in the way the appellant says, while the symptoms of depression or post-traumatic stress observed by the psychiatrist may have arisen from causes other than those recounted by the appellant.

An essential aid to assessing credibility is up-to-date information about conditions in the appellant's country of origin, but how reliable are the sources of that information? Appellants will sometimes instruct 'country experts' who have specialised knowledge of the country concerned, but, just as with the evidence provided by doctors and psychiatrists, immigration judges may not go along with the expert's opinion. Similar to the problem of internal consistency (a consistently told story need not be true) is the problem of external consistency. A story that fits with objectively verifiable conditions in the country of origin is more likely to be a true story, but equally those conditions might provide a good basis for a false story.

Eliciting evidence

Another persistent controversy concerns the way in which judges should go about eliciting the evidence upon which to base their findings of credibility and fact. One way is to sit back and let the parties slog it out in the traditional adversarial mode. The appellant will present his account, usually in the form of a witness statement standing as evidence in chief, and will then be cross-examined with a view to probing his credibility. Inconsistencies in his evidence may be exposed. But what if there is no Home Office Presenting Officer (a not infrequent occurrence), and the judge nevertheless notices inconsistencies in the appellant's account?

In one famous Scottish case, the Outer House of the Court of Session said that adjudicators (as they were called in those days) were under no obligation to put inconsistencies to the appellant and ask for an explanation. After all, a skilled cross-examiner who had exposed inconsistencies in the witness's evidence might well not ask him to explain them. If they were not addressed in re-examination, he would be able to submit triumphantly to the judge that the witness's evidence was riddled with unexplained inconsistencies. That, as the Inner House later observed, might be all very well in a *lis inter partes*, but was not suitable for refugee status determination.

Interventionist

Dr Thomas finds that many judges favour a more interventionist approach, and this may indeed become more necessary as a growing number of appellants appear unrepresented, while the UK Border Agency, having had its own budget cut, is unlikely to make up the shortfall in Presenting Officers to appear before the tribunal. Dr Thomas also identifies a third way, an 'enabling' approach that conforms with the user-friendly model of tribunals. Thus, a judge will do what he can to enable an unrepresented appellant to put his case, while if the respondent is unrepresented, the judge will not let the Home Office case go by default. The judge's task, after all, is to assess whether the initial decision to refuse the asylum claim was wrong.

A combination of the inquisitorial and enabling approaches will be needed if Dr Thomas's proposal for a radical reform of the system is ever implemented. This would make immigration judges the initial decision-makers on asylum claims, with their own researchers to produce country information. They would still be independent of the Home Office, and the system would both achieve economies by eliminating one layer of decision-making and would be perceived as fairer. Although such a model exists in other countries, there seems little chance of it ever being introduced here.

Dr Thomas finds that many judges favour a more interventionist approach . . .

Comprehensive

This review has only picked up a few snippets from Dr Thomas's densely packed tome. While the proof-reading could have been more thorough, the same cannot be said for the content. Lord Justice Laws enjoined the tribunal to produce '*effectively comprehensive*' country guidance, and what we have here is an effectively comprehensive guide to the procedure and practice, as well as to much of the case law, of the Immigration and Asylum Chambers of the Tribunals Service. It can serve as a practitioner's textbook just as much as an academic study of asylum adjudication, and may be read with profit by judges, advocates and Home Office officials. They will find it surprisingly useful in their day-to-day work.

Richard McKee sits on the Immigration and Asylum Chamber of the Upper Tribunal.

Is this approach worth the EFFORT?

***Siobhan McGrath*, who has seen mediation at the Residential Property Tribunal Service become established as a tool that can help the case management process, believes the answer to the above is 'unquestionably yes'.**

In the summer 2006 issue of this journal, I wrote an article describing the then new mediation project set up by the Residential Property Tribunal Service (RPTS). Four years later, I am in a position to describe what has been achieved and consider what the next steps should be.

Since 2006

The RPTS deals with numerous jurisdictions relating to residential property. We assess rents, undertake enfranchisement valuations, decide appeals against local authority action under the Housing Act 2004 and deal with leasehold management issues. It is this latter category of case, and in particular service charge cases, that have been the focus of our mediation scheme.

On average, we deal with about four mediations a month. By the end of 2010 we had 216 cases where the parties agreed to proceed with mediation. Of those cases, 18 withdrew because the parties reached an agreement without requiring mediation, 117 mediations were successful, 50 were unsuccessful, 24 were withdrawn for other reasons and seven are still to take place. Our average success rate over the period has been in the region of 73 per cent.

The lessons learned

Service charge adjudications require the Leasehold Valuation Tribunal (LVT) to decide on the 'payability' of service charge costs. These cases can be fiercely contested and parties can become entrenched in their positions and unwilling to make concessions. However, it is important to remember that landlords and leaseholders have a relationship that will continue long after the tribunal has adjudicated on the dispute. Arguably, it is better if they are able to reach an accommodation between themselves about how much is owed by one party to another, although this depends to a degree on what it is that parties are seeking to achieve.

Where parties agree to mediate, they are given a two-hour appointment with one of a group of RPTS chairmen and members who are trained and experienced mediators, often as part of their own practice.

To illustrate how it works, I asked the newly appointed London RPTS regional manager to describe a mediation that he had observed. The following is the account he gave:

> 'The mediation at which I observed related to an application by 18 of the leaseholders of a block of 85 flats for reductions in the service charges over seven financial years. The leaseholders were represented by one of their number and a friend who had some experience of the subject matter. The landlord was represented by the property management company's solicitor and two of the property managers directly concerned with the block.
>
> 'A very similar application in relation to a neighbouring block on the same estate had been decided by the LVT a few months earlier. That decision had been substantially in the favour of the leaseholders, and this had set a clear precedent. The landlord had offered considerable reductions on a number of items following the pattern in the earlier decision, though did not concede all matters.

'As an observer unfamiliar with the case or mediations in general, it appeared to me that the landlord's agents had come with a very straightforward and workmanlike attitude. The leaseholders were courteous and equally straightforward, probably a little overawed by the responsibility of their task.

'The landlord's agents were ready to admit the failures of the firm from whom they had taken over responsibility for the block, and to make adjustments to the service charges accordingly. I was surprised that the leaseholders representatives were so unmoved by the apparent series of concessions they were winning. They were not out for a quick and easy victory, clearly conscious of the views of fellow leaseholders and the need to uphold their interests.

'The leaseholders persisted in seeking a percentage reduction in the cleaning service charges in recognition of the poor work carried out. The landlords agents resisted. I was surprised at the tenacity of the leaseholders in view of the considerable ground they had already made. They persisted in seeking recognition of the poor quality of the cleaning service, but were prepared to compromise on a lower percentage reduction.

'The tenacity of the leaseholders paid off. Following some shuttle diplomacy by the chairman, the landlord's agents recognised that with so little left in dispute, the cost to them of proceeding to a hearing would be likely to exceed the extra amount the leaseholders were seeking, and a settlement was agreed.

'The mediation was very measured, with both sides giving proper consideration of the other's position and views. The chairman's understated and quiet manner no doubt fostered the considered and respectful approach of the parties. A reduction of over £100,000 in service charges resulted.'

Lessons

This is a typical example of the sort of case we deal with in our service charge jurisdictions. I would suggest that the lessons learned from this particular case study are as follows:

- The outcome of the mediation does not seem to have been affected by the inequality of representation between the parties.
- An opportunity was given to the landlord to make sensible concessions at an early stage and in a supervised environment.
- The attitude of both parties was positive and the approach to the task was made in a spirit of compromise.
- The compromise that was reached may not have reflected each or all of the merits of the parties' respective cases.
- Litigation cost and risk properly played a part in the agreement.

Is it worth the effort?

I would say, unquestionably yes. In devising case management at the RPTS we seek to front-load the process so that parties are engaged at an early stage. Mediation is a tool that can assist this process since the scheme dictates that a mediation appointment will be given soon after the exchange of case statements and when the parties' minds are focused on the issues at hand. This is a clear benefit, whether or not mediation is successful.

Additionally, the RPTS jurisdictions do not cover all aspects of the disputes that may arise between a landlord and a leaseholder. The ambit of a mediation is not so limited and a wider resolution of issues between the parties may be resolved.

Why has the project worked?

In the previous article I speculated on the early success of the project and came up with the following explanations:

- Staff awareness and training. To inform them of the process and reassure them that if the mediation is unsuccessful the application will continue as before.
- Tribunal member awareness. To reinforce and elaborate on the message from staff.
- The availability of support and assistance from mediation friends – students trained to provide support to those involved in mediation. We have been fortunate to have had access to a mediation friends scheme run by BPP Law School, although this is not available for the whole of each year.

I now think that there are other important catalysts at play. For example, the mediation scheme has had most success in the London region, partly because we have suitable premises and sufficient conference rooms to accommodate the mediation process, which will involve the mediator seeing the parties individually in separate rooms.

At some stage, we may try to devise a better way to measure success.

I also think it is important that the mediators are RPTS chairmen and members. This gives reassurance to the parties and credibility to the scheme. The mediators do not make an early neutral evaluation about the merits of a case and will not express a view unless asked to do so by both parties. However, the way in which negotiations are steered will be affected by the knowledge and experience of the mediator even in a purely facilitative environment. I have also observed a steely determination to reach a compromise among mediators which reflects a heartening confidence in mediation as an appropriate dispute resolution tool.

Costs

Finally, there is the issue of costs. Here I am not referring to the costs to the tribunal (although savings are undoubtedly made), but to the fact that the tribunal has no, or at least very few, costs-shifting powers. The work of the RPTS is predominantly party v party and its jurisdictions are similar or parallel to some county court jurisdictions. However, broadly speaking (and without being too technical), each party bears its own costs. I would speculate that this does have an influence on the attitude to compromise. The attitude to litigation cost and litigation risk is altered when a party considers that, win or lose, they are likely to have to pay for the case themselves.

Extending

Four years ago, I wrote of the pilot mediation project that I was confident that we were well on the way 'to getting mediation cracked'. On reflection, I think I was wrong. While we still offer mediation, and a good proportion of the mediations undertaken are successful, the focus of the project has remained relatively narrow. Now is probably the time to shake it up again and extend the scheme to other RPTS jurisdictions. In 2010 we experimented with telephone mediations for low-value or straightforward cases. This was not a success – but we may well try again.

We will, I think, need to consider how better to market mediation. I still think that parties have real difficulty in distinguishing a terminology that speaks of mediation, adjudication and also arbitration. Perhaps we should simply say to parties 'would you like to try and settle this case by agreement' and 'if so one of the tribunal members will assist in negotiations'.

Measuring success

Finally, I do not consider that the parties who have successfully mediated at the tribunal have lost out, but since mediation agreements are confidential, I do not actually know. At some stage, we may try to devise a better way to measure success. In the meantime, I am very pleased that a mediation project (that took a lot of effort to set in motion) has thrived and will continue into the future.

Siobhan McGrath is the Senior President of the Residential Property Tribunal Service.

Quick, private and INEXPENSIVE

Anne Ruff **considers the lessons learnt from non-judicial mediation in special educational needs cases, including which disagreements are amenable to mediation and ways in which the use of mediation might be encouraged.**

Mediation has many advantages. In particular:

- It encourages parties to identify areas of disagreement and propose resolutions.
- It looks to the future, rather than raking over the ashes of the past.
- It takes place in private.
- It is relatively inexpensive.
- It is quick to arrange, often within weeks of a referral.

In recent months, the Government has become evangelical about the use of mediation as a method of resolving disagreements.[1] While mediation should have an increased role to play in resolving disputes and reducing the number of appeals to some tribunals, it is not a panacea.

Background

A child has special education needs (SEN) if he or she has a learning difficulty that calls for special educational provision to be made for them.[2]

There are three main stages of special educational provision:

- *School Action*, where the school provide something additional for the child.
- *School Action Plus*, where the school consults specialists and requests help from external services.
- A statement of special educational needs after an assessment, where the child requires support beyond that which the school can provide, and the local authority arranges appropriate provision.

. . . what the parents want often has financial implications for the school.

Local authorities have a duty to make arrangements for resolving disputes between themselves and parents, or between parents and their child's school in respect of the special educational provision made for their child.

Parental rights

Disagreements between parents and their child's school which may require mediation include issues about the precise nature of a child's special educational needs or about the amount and type of support a child requires in the classroom. In other words, what the parents want often has financial implications for the school. Initially, such costs are paid for out of the school's budget and the school may consider that the parent's request is not reasonable. Alternatively, the school may think that the request is reasonable but that local authority should bear the additional cost.

Where parents are concerned that the educational provision available at the school is not addressing their child's needs, they have a right to request the local authority to undertake a statutory assessment.[3] The local authority may refuse such a request.

After receiving a draft SEN statement, the child's parents have the right to express a preference as to the maintained school at which they wish their child to be educated. The local authority is under a duty to comply with parental preference, with certain exceptions.

Parents have a right of appeal to the First-tier Tribunal (Special Educational Needs and

Disability) in respect of certain decisions made by a local authority, including a refusal to undertake a statutory assessment or to issue a SEN statement.

Why do disagreements arise?

Disagreements arise for a number of reasons, including:

- Lack of understanding by a parent, for example of their child's educational needs or of the school's provision.
- Lack of information provided by the school or the local authority to the parent.
- Lack of understanding by the local authority about the child's special educational needs.
- Limited SEN expertise within the school.
- Poor communication or lack of trust between the parents, the school and the local authority.
- Financial constraints.

Nature of SEN mediation

A trained mediator is expected to be familiar with mediation skills as well as with the legal framework and Code of Practice 2001.[4] Ideally, a mediator is supported by an administrator who is able to explain the purpose of mediation and discuss the disagreement informally with the parties involved, helping them to identify the main areas in dispute.

Mediation is voluntary and cannot be imposed on the parties. The form of mediation used is facilitative. This means that the role of the mediator is to encourage the parties to talk honestly and openly about their concerns and to help them identify how those concerns may be addressed and resolved. A mixture of joint and caucus sessions, as well as the use by the mediator of 'open questions' and 'reality testing' can enable the parties to do this. The mediator does not suggest or impose solutions on the parties.

The mediator is neutral and impartial and should try to enable all the parties to contribute fully and calmly to a discussion focusing on the child's needs. Any written agreement is not legally binding on the parties. What is discussed during the mediation is confidential.

Suitable cases for mediation

Mediation is more likely to be effective in certain circumstances.

- *Long-term relationship.* Where the parties are likely to have an ongoing relationship in the future, such as in the education of a child.
- *Lack of understanding.* Where there has been poor communication or lack of information about the other party's concerns, or because the issues are not clear cut.
- *Discretion in decision-making.* Where a decision is made using a test such as 'efficient', 'reasonable', 'suitable' or 'appropriate', an element of discretion is involved. There is probably not one 'right' answer – a range of decisions may satisfy such a test. So long as the parties are willing to be flexible, mediation can enable them to reach an agreement. For example, a local authority may offer to provide additional support at the child's existing school, which may be acceptable to a parent who initially wanted their child to attend a different school where similar support is available.
- *Particular circumstances and not policy.* Where the dispute relates to a particular pupil's needs, rather than to an aspect of educational policy or law.

Low take up

A national evaluation of SEN mediation services was undertaken in 2008[5] and identified four potential barriers to mediation from a parental perspective. These were:

- Lack of conviction of the mediator's independence from the local authority.
- A suspicion that mediation was suggested by the local authority to delay resolution.
- The perception that mediation lacked effectiveness, particularly compared with legal outcomes obtained at the tribunal.
- Confidence in winning a tribunal hearing.

Local authority officers considered that there were four other potential barriers to parents using mediation. These were:

- Advice to parents from third parties to focus on an appeal to the tribunal.
- A lack of distinction between independent mediation and other avenues for disagreement resolution.
- A lack of confidence in the credibility of mediation.
- The prospect of mediation as being too intimidating.

Local authority officers themselves were reluctant to use independent mediation because:

- There were other routes for disagreement resolution.
- Resorting to mediation was an admission of failure.
- A belief that the local authority is better equipped to resolve a disagreement internally and to do so more quickly.
- A belief that mediation escalates a disagreement.
- The perception that there was no room to negotiate
- Concerns about the cost of mediation.

The following reasons, in my opinion, also contribute to the comparatively low take-up:

- The complexity of the process.
- Lack of legal requirement for a complaints procedure at the school-based stages.
- Lack of awareness about the role and availability of independent mediation.
- Lack of confidence among, for example, some voluntary organisations that parental rights will be protected.
- The formal tribunal procedures only apply to certain disagreements and only at a relatively late stage, when one or both parties' positions may have become entrenched.
- Adversarial nature of the existing dispute resolution processes.
- A perception that because mediation does not produce a legally binding agreement it is a waste of time.
- Local authorities can justify any increase in expenditure more easily when that is the consequence of a tribunal decision.

Recent figures show that 74 per cent of appeals were conceded or withdrawn before a hearing took place – about one-third shortly after an appeal is registered, and another third within a week or so of the date of the appeal hearing.

Yet the figures from the main London mediation service provider [6] suggest that such a service can enable appellants and local authorities to resolve their differences in a significant number of cases without the need for a tribunal hearing, and ideally without the need for an appeal to be lodged. They also suggest that only a small proportion of appeals lodged were referred to the mediation provider. Bearing in mind that more than two-thirds of appeals are withdrawn or conceded prior to hearing, it is surprising that the number of requests for mediation is not significantly higher.[7]

Facilitating mediation

From my perspective as an SEN mediator, the following suggestions may serve to encourage and facilitate the use of mediation:

- The Ministry of Justice and local government should produce clear information about mediation, which stresses the independence of the mediator and includes examples of disagreements resolved by mediation. The advantages listed at the start of this article should be emphasised. Such information should be included with a decision letter from a local authority, where mediation is available or where that decision gives rise to a right of appeal.

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Yes, the time is RIGHT

Kevin Sadler **considers when it is appropriate to offer a judicial service and when it might be possible to use other skills – such as those of independent mediators – in the resolution of disputes.**

I was interested to read the articles on alternative dispute resolution (ADR) in the winter 2010 issue of this journal, having spoken about the benefits and challenges of providing proportionate dispute resolution (PDR) at the Senior President's conference in November 2010. I use the word 'proportionate' deliberately, in the belief that any alternative forms of dispute resolution must ensure that cases are dealt with in the shortest time frame possible and in a cost-effective manner, while providing that the dispute is resolved fairly and in accordance with the law. The challenge is to identity which forms of ADR maximise early settlements and ensure that cases which do not require a full oral hearing are diverted away from them.

The importance of PDR

PDR brings many benefits to tribunals administrators and judiciary, as well as to users of our service. PDR ensures that cases are resolved at the earliest opportunity and builds in flexibility for the parties. Only those cases that need an oral hearing reach that stage. This means that judges are focused on the cases that need their expertise. User satisfaction is improved because of the reduced delay in hearing the case, and because interventions such as mediation can frequently achieve high levels of customer satisfaction.

Effective PDR in tribunals

By its very nature PDR must be tailored to the jurisdiction in question and at the appropriate stage. Decisions taken by the state that could result in an appeal to a tribunal should be properly considered, with reasons given and where appropriate an independent review offered. Feedback from tribunals to decision-making agencies helps them make better decisions. Measuring and publishing the number of withdrawals or cases struck out, together with the reasons for such decisions, helps establish how effective an agency is at making decisions. Delegation to staff of routine administrative decisions ensures that judicial skills are focused on complex legal issues with panel members making a real contribution to the decision in question. Effective PDR looks across the system and challenges all our preconceptions about what is appropriate.

Current developments

There are some dispute resolution mechanisms already in place. ACAS plays a large role in settling a significant number of cases in Employment Tribunals, and administrative mediation conducted by staff in the civil courts has proven very effective. Paper hearings are used very successfully in some of our jurisdictions. In addition to non-judicial mediation, an ADR project has been designed for the Special Educational Needs jurisdiction. That project aims to identify and resolve as expeditiously as possible any case which is likely to be conceded or withdrawn before it reaches an appeal hearing.

In its Green Paper issued on 9 March 2011, *Support and aspiration: A new approach to special educational needs and disability,* the Department for Education proposes that parents and local authorities always attempt mediation before making an appeal to the tribunal (see Anne Ruff's article, page 14). We will need to consider how this might affect our SEN jurisdiction as well as any ADR scheme they might operate. In addition, the Tribunals Service is working with the Department for Work and Pensions and the UK Border Agency to improve their decision-making so that only those cases that require intervention by a tribunal come to us.

I agree with Robert Carnwath when he said in the last issue of the journal that 'the time is right to look at the balance of work between judges and administrators'. We have yet to fully explore

what actions might be delegated to staff and we need to look to the courts as well as tribunals for examples of effective delegation. With the unification of tribunals, the time is also right to look at the range of panel composition that exists across all tribunals and ask whether the current arrangements are the most effective.

Looking forward

Sir Andrew Leggatt noted in his 2001 report that 'users perceive the time of the whole process and not the stages which it comprises'. We need to look at the end-to-end process from the first decision to the final hearing and target points in the process where other forms of dispute resolution will have the biggest impact. While some good progress has been made, it has largely been on an *ad hoc* basis and its success has not been judged on the basis of other cost-effective options or the best use of resources.

With the creation of HMCTS we have the opportunity to share best practice and develop a variety of approaches to resolving disputes that are customer-focused and cost-effective. We need to ask difficult questions about when to offer a judicial service and when it might be possible to use the skills of others, e.g. administrative teams, independent mediators or legal officers. Decreasing resources and increasing workloads mean we must make the best use of our staff and judiciary.

Kevin Sadler is HMCTS Director of Civil, Family and Tribunals.

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- Financial incentives might be used. For example, mediation could be free, whereas a small fee could be charged for appealing to a tribunal which would be recoverable if the appeal is successful.
- Disputes which are amenable to mediation must be identified, as well as the stage in a disagreement at which mediation should be offered. Procedural rules might be amended accordingly. Where the parties do not refer their disagreement to mediation, the parties should be required to explain why they did not.
- The funding of independent mediation by Her Majesty's Courts and Tribunals Service rather than by one of the parties to the disagreement would emphasise the independence of the process. Another option would be for the establishment of independent local mediation organisations working in accordance with national guidelines. Such an organisation may prove more responsive to local needs that a national organisation.
- Mediation is not without its own costs. For parties to trust the process both parties should have equal access to independent expert advice. An independent expert could be appointed by the tribunal to prepare a report where required, instead of both parties obtaining their own reports from different experts. Alternatively, where one party has expertise the other party should be given access to equivalent expertise.

Anne Ruff is a mediator and sits on the First-tier Tribunal (Social Entitlement Chamber). She is a visiting senior lecturer in law at Middlesex University.

[1] See, for example, the Green Paper *Support and aspiration: A new approach to special educational needs and disability. A consultation.* CM 8027, March 2011.

[2] Education Act 1996, s312(1).

[3] Education Act 1996, s329.

[4] Special Educational Needs Code of Practice DfES/581/2001.

[5] Special Educational Needs Disagreement Resolution Services, National Centre for Social Research, Research Report DCSF-RR054.

[6] SEN Mediation Service, KIDS London, 49 Mecklenburgh Square, London WC1N 2NY. Tel: 020 7837 2900. Fax: 020 7520 0406. Web: *www.kids.org.uk/mediation*.

[7] 11(4) *Education Law Journal* (2010) 289–300 at p291, 'Mediation: Its Role in Special Educational Needs Appeals', Anne Ruff.

THE POWER TO ISSUE A SUMMONS

Charles Blake **considers the implications of *CB v Suffolk County Council* [2010] UKUT 413 (AAC), where the Upper tribunal fined a witness for ignoring a summons.**

A SMALL SCHOOL in Suffolk provided special facilities for pupils with learning difficulties. It also took other pupils who did not need special facilities. A parent visited the school to see whether it would be suitable for her son (X). Mr A, the headteacher, agreed to admit X. Mrs B appealed against various parts of the SEN statement in connection with her child.

The school had a policy of not becoming involved in cases, but it would provide written information on request. A tribunal hearing concerning X's needs and who would meet them was adjourned for further information. The tribunal also decided to issue a witness summons against Mr A to attend the next hearing. Mr A responded to say that he would answer written questions but he declined to comply with the witness summons. The response was treated as an application to set aside the witness summons which was subsequently refused by a tribunal judge.

Mr A purported to contact the Upper Tribunal, and also made further contact with the First-tier Tribunal indicating that he was withdrawing the offer of a place to X and that he would not be attending the hearing. He did not attend the hearing nor did he seek legal advice. The First-tier Tribunal referred the matter to the Upper Tribunal under rule 7 of its rules of procedure.

Issuing a summons

The decision of the Upper Tribunal includes a cogent discussion of when a witness summons might be issued. The Upper Tribunal accepted that many schoolteachers could employ their time more usefully than by attending a tribunal hearing and in paragraph 29 sets out a careful and helpful statement of the factors that the First-tier Tribunal should bear in mind when deciding whether to issue a summons, whether on its own initiative or on the application of a party. The stated purpose of a summons is to require a person to attend a hearing in order to answer questions, produce documents in their possession or exercise control relating to any issue in the proceedings. The First-tier Tribunal has the power to refer to the Upper Tribunal any failure by a person against whom a witness summons had been issued to comply with its terms. The Upper Tribunal then has all of the powers of the High Court to treat a failure to comply with a witness summons as if it were a contempt of court.

Personal attendance

The First-tier Tribunal is reminded that it should always consider an alternative to personal attendance of a witness. An order might be made for a person to answer questions or to produce documents. But there will be cases in which personal attendance of a witness is appropriate. The tribunal should consider:

1 Whether evidence should be taken sequentially and, if so, at what point in the proceedings it will be appropriate to receive evidence from the witness summonsed for this purpose.

2 Dealing with an appeal justly and fairly might include enabling all parties to participate in the proceedings by questioning a witness under a summons to attend a hearing. As such evidence is given further lines of inquiry may be generated. The tribunal members and the parties may wish to pursue such issues.

3 Issuing a witness summons might avoid delay. Even if a written order might be made for the production of documents, it might be best to have everyone round a table and able to deal with the issues as they arise.

Mr A had been in breach of the witness summons by not attending the hearing. Under

section 25 of the 2007 Act, the Upper Tribunal fined Mr A £500.

Comment

In paragraph 29 *ex seq* of its decision, the Upper Tribunal has explained how powers with potentially draconian consequences should be exercised. There is a close relationship between case management powers and the issue of a witness summons. Good case management may avoid any need to issue a summons – for example, by obtaining written statements from the parties covering the issues that lie between them. The Upper Tribunal also drew attention to the overriding objective in the Procedure Rules 'to deal with cases fairly and justly'. This prescription would frequently indicate when a witness summons should be issued.

Rules of PRECEDENT

In *SSJ v RB* [2010] UKUT 454 (AAC), the Upper Tribunal concluded that:

1 It is not bound by High Court decisions but like that court itself, will follow High Court decisions unless convinced they are wrong.

2 Where highly specialised issues arise, it may feel less inhibited than the High Court in revisiting the issues.

The Upper Tribunal applied the following analysis:

1 There is no doubt that, when applying the law of England and Wales, the Upper Tribunal is bound by decisions of the Court of Appeal on issues of law in accordance with the ordinary rules of precedent. This follows from its status as a higher court, to which the statute provides a direct right of appeal.

2 Where it is exercising a jurisdiction formerly exercised by the High Court, it need not regard itself as formally bound by decisions of the High Court. Subject to one qualification, the position should be the same as where the High Court is dealing with decisions of coordinate jurisdiction. Under this convention a High Court judge will follow the decision of another judge of first instance, unless he or she 'is convinced that that judgment is wrong, as a matter of judicial comity, but is not bound to follow the decision of a judge of equal jurisdiction' – see e.g. *Huddersfield Police Authority v Watson* [1947] KB 842, 848, per Lord Goddard CJ.

3 The one qualification that the Upper Tribunal has inserted into this formulation arises from the particular nature of the Upper Tribunal's jurisdiction, in line with the statement of Lady Hale in *AH (Sudan) v Secretary of State* [2007] UKHL 49, para 30 – see also *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734. She emphasised the highly specialised character of some legislation before the tribunals, and the need for the higher courts to respect their expertise. Consistent with that approach, where such specialised issues arise before the Upper Tribunal, it may in a proper case feel less inhibited in revisiting issues decided even at High Court level, if there is good reason to do so. The Upper Tribunal has been established by Parliament for the purpose of providing a specialist appeal jurisdiction on points of law, in many respects analogous to that of the High Court, and which is by statute made a 'superior court of record' (section 3(5) of the 2007 Act). On the other hand, the Upper Tribunal should be very cautious in questioning a proposition which has been accepted as correct by the Court of Appeal, and has been confirmed or applied by a series of High Court judges. For that reason, and on general principles, the Upper Tribunal should not depart from their approach unless satisfied that it is wrong.

Jeremy Cooper

AIMS AND SCOPE

1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.

2 To address common concerns and to encourage and promote a sense of cohesion among tribunal members.

3 To provide a link between all those who serve on tribunals.

4 To provide readers with material in an interesting, lively and informative style.

5 To encourage readers to contribute their own thoughts and experiences that may benefit others.

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