NOCKOLDS

BRIEFING PAPER: JUNE 2021

Keeping Regulation Relevant

Contents

Introduction

Welcome to the Regulation and Alternative Dispute Resolution Briefing, produced by Nockolds Resolution

As the world adjusts to 'the new normal' and what was once unfamiliar becomes a familiar part of our day to day lives, it feels appropriate to take a pause to reflect on the progress made in the world of regulation. Indeed, whilst the world has been frustrated by various lockdowns and restrictions, the world of regulation has continued at its usual fast pace.

In this briefing paper, we will be exploring the many significant and recent developments that have taken place. Our focus will be to look at how mediation could play a part within the proposals which are currently being considered by the government and regulators, and how they may impact the dispute resolution process for both professionals and the public.

Such an exploration aims to provide an up-to-date report on the current state of regulation and the work that is currently being carried out. It is hoped that this paper will also provoke a conversation about the most effective ways forward when it comes to defining the most appropriate and efficient place for mediation to take place. Though there has certainly been growing success when it comes to use of mediation in dispute resolution, there is always room for such techniques and processes to be improved.

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Influencing Healthcare Professionalism through Regulation

Published back in July 2019, the government whitepaper: 'Promoting Professionalism, Reforming Regulation' has proven to have a lasting impact, helping to emphasise the need for professionalism and effective regulatory reform.

More recently this has been followed by the Department of Health consultation: 'Regulating healthcare professionals, protecting the public' running between 24 March and 16 June 2021.

Indeed, the whitepaper introduces fresh perspectives and approaches to fitness to practise (FtP) and stresses the need for a revised approach to help deliver more responsive and proportionate processes. It also introduces a level of flexibility and agility for regulators to develop their own frameworks and approaches.

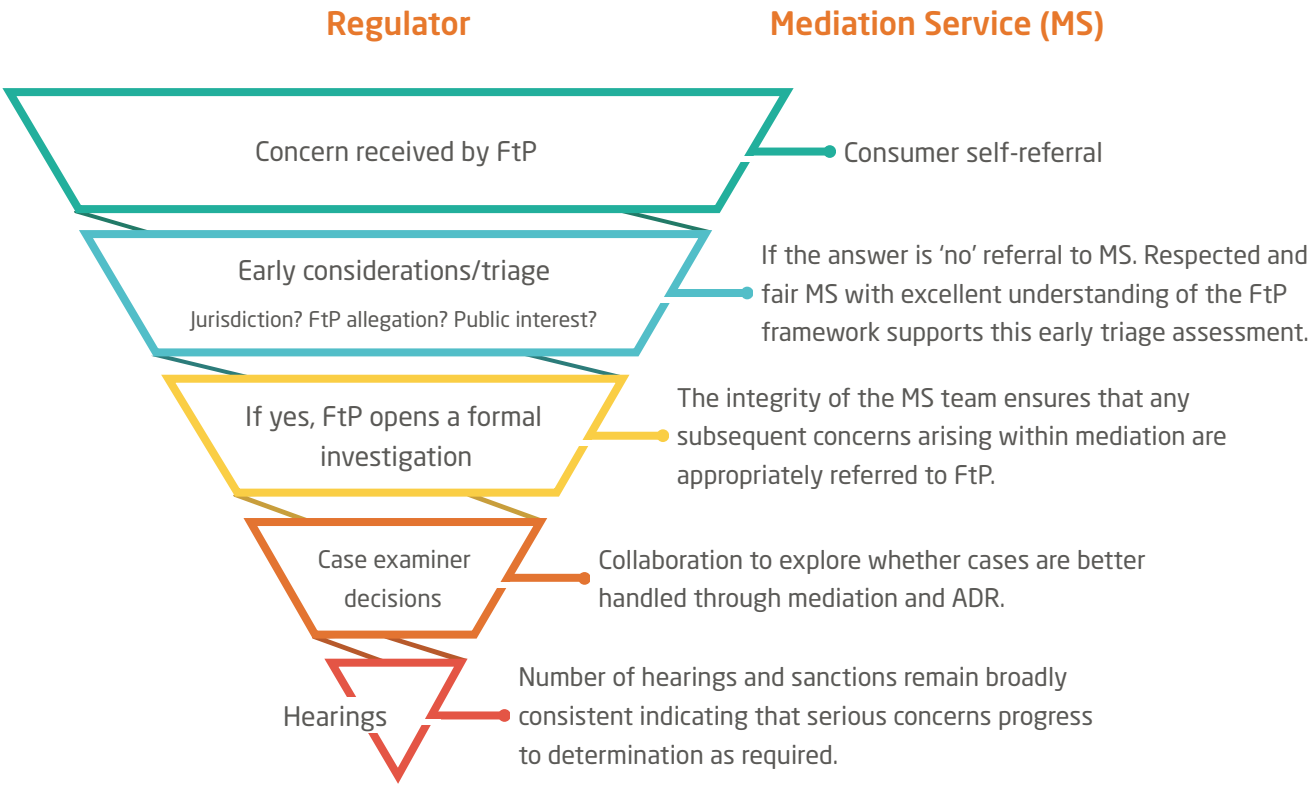
The thought leadership contained in this whitepaper is clearly borne out in practice, with the role of mediation within FtP cases rising within the pre-investigation phase. This rise has clearly been a welcome trend, with a growing number of positive responses being reported.

There is also the opportunity for collaboration as regulators look to learn from areas of regulation where mediation is already in place, e.g General Optical Council/Optical Consumer Complaint Service and Royal College of Veterinary Surgeons/Veterinary Client Mediation Service and Royal Institute of Chartered Surveyors/Mediation arm.

Exploring how mediation has had an impact and collaborating to understand how this approach could be further developed within a new framework, would support informed innovation. As well as cross-regulatory collaboration, working together with resolution expert providers such as Nockolds Resolution, pilot projects can considered which allow evidence based evaluation of the impact of different approaches. A further benefit of any pilot scheme is the ability to evaluate any proposal for accessibility, customer satisfaction, resilience and maintenance of public protection.

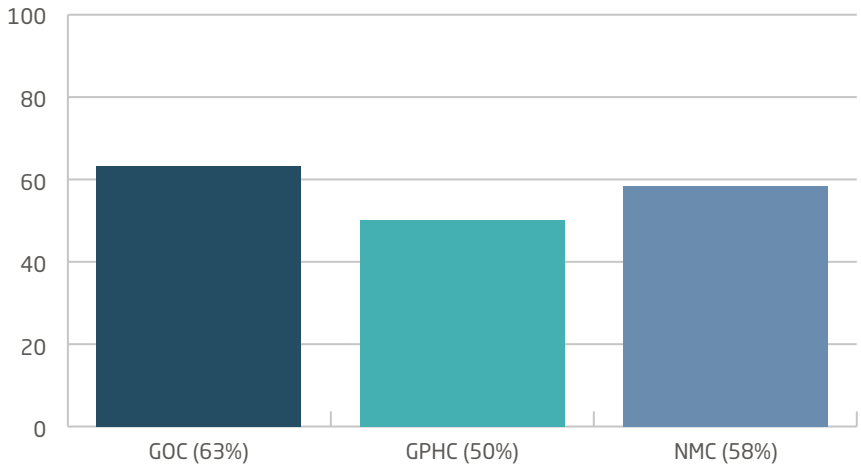
Published responses to the consultation show to strength of support for collaboration across regulation, and the desire to work together to deliver world class regulation with a positive impact on professionalism and the wellbeing of all involved.

In addition to yielding positive feedback, existing use of mediation within FtP cases has also been shown to bring about a more timely resolution to disputes as it prevents the need for a full investigation. The pre-investigation phase seeks to gather views and responses to a range of proposals to progress the reform of future healthcare regulation.



When reviewing the most recent data, it also became clear that a significant proportion of FtP concerns continue to be solved between triage and panel hearings. The reason for this is that the substance of allegations can be considered in context (which for many regulators is more important than ever in the post pandemic world).

% Cases Closed as Case Examiner Stage with No Further Action *



* Data relates to 2019/20 period as 2020/21 data has not yet been published

Within the FtP investigations concluded at this stage, some may have been more effectively addressed through mediation rather than an FtP investigation. Much depends on the statutory framework in place, and the requirement to open and progress an investigation. Collaboration may enable regulators to consider whether opening an investigation is the only option. There would be a real benefit in exploring whether a resolution focused process which places the people involved at its centre, may provide a more positive outcome with the opportunity for reflection and learning.

Experience suggests that mediation is a cheaper process both in terms of financial costs and also emotional impact on the parties involved. If collaboration can help everyone engaged in regulation and regulatory processes to evolve smarter, kinder and effective frameworks and approaches, this will be a win-win outcome.

A CLOSER LOOK AT FTP

Looking at the above data, it would certainly seem that a significant proportion of concerns received by regulators do not involve substantive allegations of impaired fitness to practice, but appear to reflect situations where a registrant was unable to resolve an issue or a conflict.

In addition to the above category of concerns, regulators also receive concerns where complainants/referrers remain concerned about the professional's competency or capacity to practise. Similarly, some concerns are raised by organisations (employers, other public bodies, etc.), whilst others are raised by patients/family/members of the public.

In either case, such instances represent an unresolved dissatisfaction or concern. This is of course where the work of the Nockolds Resolution is so effective in resolving lower level complaint issues. This can be through de-escalation which can then, avoid situations giving rise to allegations of impaired fitness to practise. Mediation is also effective in addressing disputes caused by miscommunication or misunderstanding, where both parties are able to gain a greater understanding of the other's perspective, which can allow for more constructive communication and dialogue.

Sitting before the FtP process, effective mediation is capable of resolving low level concerns which are either on initial assessment or under Acceptance Criteria, where available under relevant statutory frameworks. Providing a highly effective resolution method, and proven to have a positive impact when resolving concerns, the outcome of mediations are also useful when it comes to upstreaming data, with the learnings and reflections on mediation cases often providing valuable insights that can help professionals to provide a better service and mitigate the risk of future disputes.

In addition to providing further insights into the best strategies of resolving disputes, the past year has also been a period of time where a wealth of research has been performed into the ways that mediation might also contribute to managing concerns which do result in an investigation being opened.

Of course, mediation offers a proportionate methodology where the concerns do not raise issues of public protection or risk serious harm to confidence in the profession. These lower level complaints need to be dealt with in a positive way and the priority should always be seeking

an effective resolution for the complainant, reflection for the professional and insight to share across the profession. Whilst this may present something of a fresh and challenging proposition, it nonetheless provides adequate opportunities for reflection and learning when conducted in a distinctly non-adversarial fashion.

Like all other modes of mediation, this approach should always strive to promote open and early resolution with the additional benefit of being able to upstream findings so that such open conversation may happen earlier.

Proposals for the Future of Resolution

The current consultation seeks feedback on proposals which include a number of possible changes to current practice. In specific, the changes proposed to FtP include:

- A three stage approach from initial assessment (1) to case examiner (2) and FtP panel stage (3)
- A clearly defined list of grounds for action. Specifically, the grounds would be based on a lack of competence or allegations of misconduct.

What is perhaps most significant when considering these changes is the way that a three stage approach would allow the mediation process to take place during the initial assessment phase. By introducing this process earlier on in a dispute, it is of course expected that stress, time and expense can be saved where earlier resolution is appropriate..

In addition to these key points, the consultation refers to wider reaching reform proposals which would provide regulators with greater agility to empower them to resolve cases in the earlier stages. The proposals include 'Accepted Outcome' decisions where registrants could agree an outcome and measure made by case examiners.

The consultation also considers the impact of a far broader range of measures. These measures would include issuing a warning, applying conditions to a registrant's practice, suspending their registration, or removing the registrant from the register. It is not hard to imagine how having access to a wider range of measures would provide those working to address and resolve FtP concerns with powerful tools that will combine an outcome which is more proportionate and with greater future impact, and greater efficacy within the FtP process.

Another exciting proposal is the recommendation that regulators are provided with the ability to set their operational procedures through rules, removing the requirement for such procedures to be approved by the Privy Council. This could pave the way for regulators to consider and pilot the use of more innovative approaches such as mediation.

Another key proposal which promises to improve the efficiency and effectiveness of the mediation process is the right for anyone to request a review of a fitness to practise decision made by a case examiner. The proposal would also provide all regulators with a power for the Registrar to review a decision made by a case examiner at the initial assessment stage of a case.

Altogether, these changes aim to deliver a fitness to practise process that is less adversarial and will ensure that a greater number of cases are resolved without the need for a fitness to practise panel hearing. Obviously, this will provide a range of benefits to all parties involved in fitness to practise proceedings and make for a far more streamlined process. Public protection must remain a core element in the FtP process, but delivering this in a way which does reduce the overall stress on registrants and also witnesses is a key and ongoing objective. In short, it's a process that is fit for both 'the new normal' and the future.

The following table provides a granular breakdown of the strengths and weaknesses of the proposals outlined in the whitepaper as well as a summary of the key elements of the proposals in terms of the progression they create or the challenge posed:

P Progressive	» Focus on resolution of cases more quickly » Focus on supporting the professional standards of all registrants » Proportionality impact considered in all decisions and processes » Seeking to create an FtP process which is less adversarial, resolved without the need for full public hearing – reduce stress and increase likelihood of reflection and learning » Power to exclude reflections in evidence placed before the panel » Accepted outcome decisions - at case examiner stage, where registrant accepts impairment and measure proposed by case examiner » Collaboration – 'duty to co-operate' across regulators » Define CPD requirements - can use concerns and low level complaints to guide areas of focus to improve standards – highlight what is expected from a 'professional' - conduct, communication, etc. and support those non-clinical skills » Regulator ability to set own operational procedures (Q16)
C Challenges	» Proposal still retains a process which is by nature, adversarial, which is likely to be disproportionate for the majority of concerns referred to a regulator

Moving Forward

Responding to these proposals, regulators and other stakeholders have made it clear that they are considering whether they will be effective in creating a less adversarial process which places learning and reflection at its heart, ensuring that measures which are introduced are only done so if they can be proven to improve practise and public protection. In order to understand from our own perspective which measures stand to have the greatest impact, we initiated dialogues which explored the most constructive outcomes for future practise, and provided sufficient room for stakeholders to reflect on ways that conduct can be meaningfully improved in future.

When we asked the question "is there a role for mediation in that space?", we were told that in order for reforms to provide a powerful step forward, they should create:

- A proportionate, and less adversarial way of dealing with concerns about professionals with the necessary public protection safeguards.
- Overall, a more effective public protection framework, that listens to patients and responds to their concerns, and has the confidence of the public and professionals.

Breaking these down, it becomes clear that making mediation a non-adversarial experience whilst at the same time protecting those involved is absolutely vital. This is something that most regulators have been striving towards even before it was enshrined in a government whitepaper in 2019. Working together is a fundamental principle of mediation. Indeed, there is absolutely no benefit to any party if the mediation process is regarded as being in any way adversarial. Rather than creating the kinds of constructive and mutually beneficial outcomes that define a successful dispute resolution, a hostile environment does nothing but cause more division and make parties less able to negotiate.

The second point suggests that there is still some work to do in the area of public perception. More specifically, regulators should identify the kind of messaging which clearly communicates the impartiality of mediation providers and how consumers are not at risk of being sided against. A public protection framework would certainly make this an easier task and would ultimately help to make impartiality a clear part of an official mandate. Of course, it is crucial to recognise how this may impact professionals as any tilting of the scales poses to disrupt their trust if it is not carried out effectively. This is certainly something which will be important to monitor as it develops over time and as the new proposals begin to take effect.

CONCLUDING REMARKS

Ultimately, the latest research and Consultation proposals identify how the benefits of mediation align, and would support the delivery of the common goal and aspiration when it comes to complaint resolution within regulated healthcare professions. Namely, they represent a strong desire to streamline the process and to position it in the most effective way possible. Indeed, by proposing a three stage approach from initial assessment through to the panel stage, it is clear that mediation can be introduced early on to become an even more powerful and effective tool.

What's more, the proposals outlined in the government whitepaper provide a veritable roadmap that enables mediation experts to navigate "the new normal" and develop as an industry. These remain on the agenda given the reform proposals set out in the Consultation. Indeed, it is important that Regulators continue to reassess the best way forward when it comes to resolving disputes, and this can only ever be done by fine tuning and adjusting what is currently in place.

One final point which bears repeating when it comes to the Department of Health and Social Care Consultation, is the aims it outlines. Specifically, the literature stresses how it is essential that Regulators:

- Address concerns more about the performance of professionals in a more proportionate and responsive fashion
- Increase the efficiency of the system

These aims have a clear relevance to the mediation process, specifically with mediated issues resolved efficiently, and handled in a proportionate and responsive fashion. It is surely the case that by allowing these primary points to drive future development, Regulators and the public stand to be far better served by mediation and other strategies which are proven to bring about constructive and successful outcomes.

So, the question is if not now, when should we widen the use and positive impact of mediation within regulation and in particular across FtP to create an even more progressive, effective, kinder and person-centred approach to professional regulation?