

WORKING WITH HEIs TO DEVELOP MEDIATION TRAINING

Strand C Report

Improving Dispute Resolution
A HEFCE Leadership Governance and Management Fund Project

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Preface

What is mediation and why is it helpful?

The project website gives a brief description of mediation and the way it works at

www.staffs.ac.uk/idr/whatismediation.html

'Mediation awareness' is growing, but there is still a surprising amount of ignorance about mediation in HEIs. It is often being introduced with other forms of 'alternative dispute resolution' where it has a local 'champion', someone who has realized its potential advantages. This can mean that, for example, only HR or Personnel or only Student Services have introduced such provision and the HEI as a whole has not yet become aware of its possibilities.

This Report seeks to provide a practical guide to the introduction of mediation as a route to better dispute resolution in HEIs.

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1. Setting up an in-house mediation service

i. Experience so far

- 1.1 HEIs which have set up or are in process of setting up an in-house mediation service, or making formal provision within their procedures to use mediation where appropriate, have been pioneering more or less independently. So a good place to begin is by looking at what others are doing. HEIs thinking of setting up their own arrangements may wish to contact others on the list below for information about their experience so far.

List of in-house mediation services in HEIs

- 1.2 University of Bath
www.bath.ac.uk/universitysecretary/equalities/policies/mediation.html
- University of Birmingham (Workplace mediation)
www.hr.bham.ac.uk/empsupport/mediation
- University of Bristol (Workplace mediation)
www.bristol.ac.uk/secretary/grievances/staffmediation.html
- Brunel University (Students)
brunelstudents.com/arc/content/index.php?page=26823 click on Mediation for students
brunelstudents.com/files/minisites/4375/Information_about_Mediation_for_Sudents.doc
- University of Canterbury Christ Church Mediation Services (CCMS)
www.canterbury.ac.uk/social-applied-sciences/crime-and-policing/mediation-clinic/mediation-services.aspx
- University of Dundee
www.dundee.ac.uk/student-services/mediation.htm
- University of Central Lancashire
www.uclan.ac.uk/information/services/hr/hr_employee_relations/mediation.php
- Leeds Metropolitan University (staff and student services)
www.leedsmet.ac.uk/metoffice/Mediation_service_information_for_students.pdf
www.lmu.ac.uk/metoffice/equality_diversity/Pages/LMDiversity/DiversityLM_AboutMediation.html
- University of Leeds (Workplace mediation)
www.leeds.ac.uk/mediation
- Newcastle University (Workplace mediation, ACAS-related)
www.ncl.ac.uk/hr/policy/mediation/documents/policy-meditation-information-participants_jb.doc
- Nottingham Trent University (Equality and diversity)
www2.ntu.ac.uk/eqo/Mediation.htm
- University of Salford (Workplace)
www.hr.salford.ac.uk/docs/Grievance_Procedure_and_Mediation_Guidelines.doc
- University of Southampton (Equality and diversity, internal access only?)
www.soton.ac.uk/about/diversity/mediation.doc

Also see [Strand A Report](#) Appendix for this list of in-house mediation services. We are hearing of interest in setting up mediation services in a growing number of HEIs.

1.3

We shall welcome correction of the above information, particularly:

- updating of the scope of in-house mediation services (staff, student, other)
- whether information about your in-house mediation service is available on the open web or only on your intranet.

ii. Informing potential users

Dundee

- 1.4 One of the pioneering in-house providers for the use of mediation in staff cases is to be found in Scotland, at the University of Dundee, whose Early Dispute Resolution Initiative (EDR) has been developed over two years and was formally launched a little more than six months ago. 'It has developed in a wholly collaborative way and information and material is now on the university website, freely available to anyone to see and use or adapt':
- 1.5 Dundee has ensured that anyone seeking an avenue of recourse or wondering how to deal with an incipient dispute can easily see that this option is available.

1.6 *"A piece of text on EDR (a 'floater'), with the agreement of all the unions, now 'sits over' all the university policies." **

- 1.7 Dundee has also sought to ensure that the service is independent and (equally important) perceived as independent by potential users:

1.8 *"The EDR initiative is not a management or an HR tool. It is entirely separate from the HR function - and HR have been supportive. Referrals/requests come via the Healthy Working Life Group, Occupational Health, Human resources, etc."*

- 1.9 www.somis.dundee.ac.uk/academic/earlydisputeresolution/welcome.htm

The Canterbury Christ Church Mediation Clinic

- 1.10 This mediation service gives a short clear explanation of the essentials on its website, beginning with the following points and going on to explain to participants what happens in a mediation:

1.11 **Mediation Services**
Christ Church Mediation Services (CCMS) offers a free dispute resolution service to those parties who cannot afford to pay, facilitated by a third party mediator conducted in a neutral setting. CCMS offers the same service to those parties already represented by solicitors based on a competitive charging structure.

There is no compulsion to mediate

It is important to remember that mediation is a wholly voluntary process, there is no compulsion on the parties to submit their dispute to mediation. As a party to a dispute you must want to try mediation as an appropriate means to resolving your dispute, rather than seeking more confrontational or adversarial methods.

* SCOTTISH MEDIATION NETWORK, Workplace and Employment Initiative Group, Meeting on 24 June 2009, 18 York Place, Edinburgh, EH1 3EP, Fiona O'Donnell (Legal Counsellor, Academic Affairs) and Ellie Douglas (Director of Student Services) Dundee University, gave a presentation and talk about the University's Early Dispute Resolution (EDR) initiative.

Confidentiality is key

The mediation process is also confidential. Once you and the other party has agreed to try mediation, you will be asked to sign an agreement at the commencement of the mediation to be bound by confidentiality. Essentially this means that all parties to the mediation, including the mediator, agree not to repeat anything raised during the course of the mediation.

Similarly the process is accepted by the parties as being without prejudice, implying that if the dispute does not settle following the mediation and litigation ensues, neither party can use any information disclosed during the course of the mediation in subsequent proceedings.

Neutrality and impartiality

The mediation process is neutrally facilitated by an impartial third party mediator, which brings a completely different dynamic to the negotiations which may have been conducted hitherto. The mediator's task is not to take sides or pass judgement. The mediator assists the parties in finding a mutually acceptable solution to the dispute which may well have reached a position of stalemate.

Empowering the parties

As a party to mediation you will have full control over the process. You can call the mediation to a close at any time, however with the assistance of the mediator you will be given a real opportunity to explore a whole range of options. In so doing the process can be described as empowering.

The Mediator's Role

The mediator does not take sides. The role of the mediator is to facilitate, in other words, to help the parties reach a solution that they can both live with. There are times when the mediator will test the reality of a party's position on an issue, but on the whole the mediator will gather information, enable you to vent your emotions and express your views, encourage you to look at the dispute from different angles, focus on the issues rather than the parties, encourage problem solving and suggest options for consideration.

Throughout the process the mediator will respect the confidential nature of the mediation both in private sessions and when meeting jointly.

Your Role

It is most important that you approach your mediation session with positive intentions. Your overall goal should be to reach a mutual agreement with the other party over the issues in dispute and one which you are both prepared to accept. This will mean being flexible and being prepared to compromise.



1.12 www.canterbury.ac.uk/social-applied-sciences/crime-and-policing/mediation-clinic/mediation-services.aspx

1.13

Future needs: the development of a clear accessible statement of what mediation involves and a set of FAQs for HEIs to use as a basis if they wish

iii. Networking with your in-house mediation service: the Scottish Mediation Network

1.14 Consider putting information about your mediation service online

1.15

HEIs which keep information about their mediation services on their intranet may be losing opportunities to network.

1.16 The Scottish Mediation Network www.scottishmediation.org.uk has among its objectives ‘awareness raising, information generation, developing good practice, supporting/networking’.

- 1.17
- The SMN concentrates on Workplace Mediation and does not include student or other types of case.
 - There are comparatively few Scottish HEIs so a network of this sort might be more difficult to set up in England and Wales, but it is clearly worth the attempt.
 - Problems of conflict of interest will need to be addressed if a future Network includes commercial providers of training or commercial lists of approved mediators as well as HEIs running in-house mediation services or using specialist mediators trained for work within higher education.

1.18

Future needs: an online reference resource to enable HEIs to share experience and find local institutions able to provide mediators where a student or member of staff is reluctant to trust the in-house service.

iv. Research: the Canterbury Christ Church Clinic

1.19 Many law courses both academic and vocational now include at least a ‘mediation module’, but these seem to be limited to teaching. One HEI, Canterbury Christ church, is developing mediation provision in conjunction with its delivery of legal education and including research in the area.

1.20

“The mediation clinic is the first of its kind in a UK law school and the study of alternative dispute resolution will produce a research-based curriculum. It will provide academic staff with data which will form the foundation of research projects, which may be entered into collaboratively with other departments within the university, or externally with private sector, public sector and voluntary sector providers.

The clinic also provides a knowledge sharing forum which amongst other things will assist in spreading the message about the appreciable benefits of alternative dispute resolution and particularly mediation.”

1.21 www.canterbury.ac.uk/social-applied-sciences/crime-and-policing/mediation-clinic/Research.aspx

1.22

Future needs: Research in this area is strongly to be encouraged in HEIs, and especially where it links legal and business courses with experience in mediation-provision.

v. Where are HEIs looking to use mediation?

- 1.23 Most HEIs with in-house mediation services have begun to use mediation in employment disputes or in connection with equality and diversity work. Some have expanded the provision to include disputes involving students and other kinds of dispute.
- 1.24 It is apparent from the list given under 'Experience so far' above that comparatively few HEIs have yet created all-purpose mediation provision or explored the potential of mediation as a dispute-resolution method across the board, so as to include the whole range of potential disputes which can arise in a HEI.

1.25

Future needs: HEIs should be encouraged to take a comprehensive overview of their dispute-resolution strategies and to consider the full range of needs to be met in their institutions.

2. Training options

i. Training providers

- 2.1 The most important distinction to be drawn is between ‘staff development’ training for in-house mediators and training which claims to provide a portable ‘qualification’.
- 2.2 HEIs looking for help with training should bear in mind that mediation is not a regulated ‘profession’ and it has no professional body. This is a problem the IDR project is working to address but it will not be easy to resolve. The commercial training providers have a strong vested interest in continuing to provide unregulated courses where they are free to assess candidates and register them as ‘mediators’ on their own lists.
- 2.3 Some trainers claim to offer ‘accredited’ courses, which may mean that they carry credits within the Open College Network.
- 2.4 www.nocn.org.uk
- 2.5 This is not a ‘higher education’ level of credit and it prompts the question at what level a training in mediation should ideally be set.
- 2.6 For example, Leeds Metropolitan states that:

*“Leeds Metropolitan University has a team of mediators professionally trained by Conflict Management Plus Ltd. Their qualification is accredited by the OCR (Oxford Cambridge and RSA Examinations).” **

- 2.8 Any claim to be a ‘national’ qualification at present carries only the warranty of the provider. **There is no national qualification framework for mediation.**
- 2.9 Reference to any specific providers has been removed.
- 2.10 The Chartered Institute of Arbitrators www.ciarb.org runs a ‘recognised course provider scheme’ including modules in arbitration:
- 2.11 www.ciarb.org/education-and-training/exemptions/001-recognised-course-provider-scheme
- 2.12 (Arbitration is governed by statute under the Arbitration Act 1996)

Future needs: the IDR project is exploring routes towards the creation of quality-assured courses delivered under the auspices of degree-awarding bodies.

ii. In-house training

Engaging the institution in a change of approach

- 2.14 HEIs agree on the importance of spotting potential disputes at an early stage. It is difficult to draw up a simple set of rules which will help to achieve this objective, because of the enormous range of

* www.lmu.ac.uk/metoffice/equality_diversity/Pages/LMDiversity/DiversityLM_AboutMediation.html

problems which can occur. But there is another way, which is to work towards changing the climate of expectation in the handling of disputes. Experience with mediation can be helpful here. Dundee has observed a ‘ripple effect’ which opens up the promising possibility that senior individuals in a HEI may become interested and foster the introduction of mediation and other forms of alternative disputed resolution:

- 2.15 *“A ‘ripple effect’ has been noticed - and it seems that EDR is being recognised from within as useful in the institution, not as a tool but as an approach - modelling behaviour and offering skills useful for everyone. Approval has evolved (not a ‘top-down’ process or ‘pushed through’) and EDR has been supported through local budgets and goodwill. Now 3 University Court members are trained mediators. The skills for early dispute resolution are being widely disseminated and a toolkit being developed.” **

Choosing your mediator-trainees

- 2.16 It is important to ensure that an in-house mediation service aims to include mediators with a variety of backgrounds and positions in the organisation.

2.17 At Dundee:

- 2.18 *“A group of mediators, with widely different backgrounds, styles, experience, have been trained and accredited through a variety of different training options. There are currently 9 fully trained mediators and 12 student mediators [i.e. mediators in training].”*

2.19 At Dundee, ‘usually two mediators co-mediate’, which helps to ensure that mediators have relevant knowledge in dealing with a case.

2.20 This practice raises an important matter of principle. Mediation is usually presented as a skill best exercised without specialist knowledge of the matters in dispute. However, in HEIs there is often benefit in the possession of relevant knowledge about what may be arcane and complex features of the working and study environment.

2.21 A HEI may offer staff development courses in early or alternative dispute resolution, or in mediation skills.

- Staff and students interested in dispute-resolution may volunteer to undergo mediation training. Will these be the right people? How should they be assessed for suitability?
- Releasing staff to do their training will mean allowing time off to attend courses.

- 2.22 **Future needs: There is a need for further work on selection for in-house training. It might be helpful to develop criteria of suitability for choosing prospective mediators. Should these be based on existing skills and professional expertise, personality, commitment, posts held in the HEI? We should be grateful for comment on the appropriateness of such criteria and other suggested approaches to choosing the right people.**

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Having a code of conduct for your in-house mediators

- 2.23 In-house mediators should be expected to respect a code of conduct. Dundee uses the European Code of Conduct for Mediators, though this appears to need adaptation for use in HEIs. This is a voluntary code and does not pretend to be the equivalent of the code of conduct of a professional body or to engage ‘fitness to practise’ considerations though it recognizes the importance of such protections.
- 2.24 This code of conduct sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. It is intended to be applicable to all kinds of mediation in civil and commercial matters.
- 2.25 Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect the code. Organisations have the opportunity to make available information on the measures they are taking to support the respect of the code by individual mediators through, for example, training, evaluation and monitoring.
- 2.26 The whole code may be accessed at:
- 2.27 ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf
- 2.28 www.somis.dundee.ac.uk/academic/earlydisputeresolution/welcome.htm
- 2.29 The sections given below appear particularly useful for HEIs:

2.30 **1.1 Competence**

Mediators shall be competent and knowledgeable in the process of mediation. Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

1.2 Appointment

The mediator will confer with the parties regarding suitable dates on which the mediation may take place. The mediator shall satisfy him/herself as to his/her background and competence to conduct the mediation before accepting the appointment and, upon request, disclose information concerning his/her background and experience to the parties.

1.3 Advertising/promotion of the mediator’s services

Mediators may promote their practice, in a professional, truthful and dignified way.

2.1 Independence and neutrality

The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests. The duty to disclose is a continuing obligation throughout the process.

Such circumstances shall include

- *any personal or business relationship with one of the parties,*
- *any financial or other interest, direct or indirect, in the outcome of the mediation, or*
- *the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties.*

In such cases the mediator may only accept or continue the mediation provided that he/she is

certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.

2.2 Impartiality

The mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

3.1 Procedure

The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator shall in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement shall, upon request of the parties, be drawn up in writing.

The mediator shall conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible power imbalances and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute. The parties shall be free to agree with the mediator, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

The mediator, if he/she deems it useful, may hear the parties separately.

3.2 Fairness of the process

The mediator shall ensure that all parties have adequate opportunities to be involved in the process.

The mediator if appropriate shall inform the parties, and may terminate the mediation, if:

- *a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or*
- *the mediator considers that continuing the mediation is unlikely to result in a settlement.*

3.3 The end of the process

The mediator shall take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification.

The mediator may, upon request of the parties and within the limits of his or her competence, inform the parties as to how they may formalise the agreement and as to the possibilities for making the agreement enforceable.

3.4 Fees

Where not already provided, the mediator must always supply the parties with complete information on the mode of remuneration which he intends to apply. He/she shall not accept

a mediation before the principles of his/her remuneration have been accepted by all parties concerned.

The mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.

2.31

Future needs: The development of a standard code of professional conduct for mediators in disputes in HEIs, applicable both to in-house and to external mediators, for HEIs to adapt to meet their own needs.

iii. Providers of outside mediators

2.32 In some circumstances an in-house mediation service may need to be supplemented by external mediators. A student or member of staff may not ‘trust’ an internal mediator to be independent of the HEI. In that case, partnership arrangements among local HEIs with their own mediation services may be useful in providing a wider choice. In some cases, the dispute has become so complex, or involving very senior staff, or both, and a mediator is needed who will be of sufficient seniority and have sufficient ‘clout’ to be effective in facilitating a resolution.

2.33 The Civil Mediation Council, an organisation bringing together some of these ‘providers’ has run a ‘pilot’ accreditation scheme for the organisations which ‘provide’ mediators from their own lists for the courts’ approved lists, which may be found at:

2.34 www.civilmediation.org/provider-organisations.php

2.35 This was not a scheme for fully accrediting the training:

2.36

“Accreditation relates to the standards, quality, and characteristics of the provider and not to its individual mediators but set basic standards of training, CPD, and administration.”

The Civil Mediation Council

2.37 The National Mediation Helpline may be accessed at:

2.38 www.nationalmediationhelpline.com

2.39 This is operated on behalf of the Ministry of Justice in conjunction with the Civil Mediation Council and provides a list of ‘providers’ at:

2.40 www.nationalmediationhelpline.com/providers

2.41 Although these are listed as providers of ‘trained’ mediators some provide training. They are often happy to quote for the cost of providing in-house courses for HEIs.

2.42 Canterbury Christ Church University
North Holmes Road
Canterbury Kent
CT1 1QU
Telephone: 01227 767700

2.43 Is listed among these providers and could be contacted by HEIs interested in setting up something similar for themselves.

iv. Finding specialist mediators for higher education disputes

- 2.44 Littleton Dispute Resolution Services Ltd
Littleton Chambers
3 Kings Bench Walk
North Temple
London EC4Y 7HR
Telephone: 0207 7978600
- 2.45 Can provide senior barrister mediators with experience of successful mediation in complex higher education cases.
- 2.46 A specialist mediation service for higher education may be accessed at:
- 2.47 oxcheps.new.ox.ac.uk/MainSite/pages/mediation.html

3. Dealing with a dispute

i. Triage or early neutral evaluation

Spotting trouble early and providing an avenue of recourse

- 3.1 Where a complaint or grievance is initiated within an adversarial procedure such as a student complaint or staff grievance procedure, the person complained or grieved against feels ‘attacked’. The institution may close ranks with the senior figure accused and it then becomes extremely difficult to resolve the complaint or grievance speedily and to everyone’s satisfaction.
- 3.2 If a member of staff or student or ‘management’ wants to make use of the service, there needs to be a port of call. Dundee provides one, as does Leeds Metropolitan. This provision may overlap with one of the possible roles of an [Ombudsman](#).
- 3.3 Alternatively, mediation providers may be able to offer a mediator who can provide early neutral evaluation. This is a process of stocktaking which can be immensely helpful in assisting both a complainant and the HEI to disentangle the threads in a complex dispute.

Triage

- 3.4 The need for this sort of ‘triage’ is recognized by bodies such as HEFCE, the QAA and the Information Commissioner. All three are familiar with cases in which a personal problem has become embroiled with complaints about the way a HEI has allegedly followed or failed to follow its procedures, with complaints or concerns about matters which fall within the remit of one of these bodies. The result can be unwieldy and can present almost insuperable difficulties in disentangling the threads.
- 3.5 The Information Commissioner has set up a Triage Team which has been running for some months (August 2009). It considers cases where there seems a chance of early resolution or which can be scoped to ensure that when the case is allocated to a case officer all the necessary information and evidence is available. These cases can then be fast-tracked with the aim of resolving them within ninety days and shrinking the backlog of cases which has built up.
- 3.6 There is also a framework providing standard investigatory sequences for particular ‘exemptions’ under the Freedom of Information Act, for example:
- 3.7 1 (is information held?),
12 (does the fees limit apply),
14 (is the request vexatious),
40(1) (is it the complainant’s personal dispute),
40(2) (is it a third party personal dispute)
43(2) (is there a commercial interest that can be protected).
- 3.8 With more sections to be looked at for similar treatment as the provision develops. This might offer useful possibilities for HEIs to do something similar in developing protocols for fast-tracking resolution of their own more complex disputes.

3.9

“There is also a panel of senior members of the ICO who consider many of the cases at a very early stage and their input is used when making the decision about which cases can be considered by triage and how they anticipate the investigation to go forward.”

(Information provided by IC).

3.10 HEFCE also makes provision for orderly preliminary consideration of a public interest disclosure made to it,

3.11 www.hefce.ac.uk/finance/assurance/public.asp

3.12 and the QAA does the same in the case of ‘causes for concern’.

3.13 www.qaa.ac.uk/causesforconcern/concern.asp

3.14

Future needs: The IDR project in collaboration with UKRIO is hoping to provide a list of experienced advisors for HEIs or complainants to draw on when early neutral evaluation appears to be potentially useful in ensuring that it is clear what the issues are and how they may best be addressed, and in helping to ensure a dispute does not escalate.

ii. Ensuring finality in resolutions arrived at through alternative dispute resolution

Can mediation lead to binding agreements?

- 3.15 HEIs understandably want finality in dispute resolution, and finality is also in the interests of students and staff involved in disputes, especially when a dispute has run on for years. When mediation is successful it results in an agreement. That agreement can be made binding by being drawn up in agreed terms and signed by the parties, when it becomes a contract.
- 3.16 In a mediation lasting less than a day ‘heads of agreement’ may be arrived at but there may not be time to agree detailed wording. It is sensible for the HEI to offer to provide expert drafting by its lawyers, subject to the agreement of the other party or parties. In the case of an employee it is a requirement that the employer will pay for the employee to obtain legal advice before signing. It must be right for that provision to be extended to a student too so that the student may have informed expert advice on the wording proposed.

Gagging clauses

- 3.17 The inclusion of a gagging clause in such an agreement in an attempt to prevent the raising of concerns with the appropriate outside bodies is common, even though in the case of universities this was expressly disapproved of by the Committee on Standards in Public Life in its Second Report of 1996:

3.18

R8. Where it is absolutely necessary to include confidentiality clauses in service and severance contracts, they should expressly remind staff that legitimate concerns about malpractice may be raised with the appropriate authority (the funding council, National Audit Office, Visitor, or independent review body as applicable) if this is done in the public interest.

- 3.19 This is not new:

3.20

“The Employee agrees that he has not and will not make or otherwise communicate any disparaging or derogatory comments whether in writing or by spoken word and whether or not they are considered by the employee to be true, concerning the university.”

- 3.21 Thus the University of Glasgow. The Scottish Funding Council, alerted to this practice of using gagging clauses in severance agreements in return for payments for silence and where no commercial confidentiality is involved, entered into correspondence with the University, as reported by the Scottish Sunday Herald. For the SFC had stated in 1998 in its guidance in the wake of the coming into force of the Public Interest Disclosure Act, that ‘Institutions must not agree to confidentiality clauses within severance agreements except where it is necessary to protect commercially sensitive information.’
- 3.22 www.sundayherald.com/news/heraldnews/display.var.1201128.0.university_defends_gagging_clause_in_redundancy_deals.php

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- 3.23 HEFCE does not approve of gagging clauses either. In a circular letter dated 4 March, 2009. ‘Our guidance to HEIs is that compromise agreements that include confidentiality clauses ... should be the exception rather than the norm.’ In Oxford they are the norm. ‘The National Audit Office (NAO) published guidance on ‘Ending a Contract of Employment on Enhanced Terms’ in 2007 in which it made clear that any confidentiality clause should ‘not prevent the wider public interest being served’.
- 3.24 In any case, a gagging clause is likely to be void if it attempts to prevent public interest disclosure and HEFCE will consider a disclosure made by a ‘gagged’ individual at the “gaggee’s” own risk. It is hard to imagine any HEI seeking to sue for breach of contract if a gagging clause is broken, since there would be inevitably damaging publicity. So as a matter of public policy and pragmatic realism, gagging clauses are best avoided.
- 3.25 This should be born in mind in arriving at mediation agreements.