

Professional Conduct Procedure

PR7 - Protocol for Consensual Disposal

Policy Statement

The introduction of Consensual Disposal modernises the way in which the Association regulates its Members in matters where allegations of misconduct/complaints have been made. This is necessary to:

- improve transparency of process and outcome for the public and BACP Members;
- enable proportionate outcomes to be reached efficiently, at reasonable cost, and in the interests of the public; and
- reflect the Association's role of public protection.

This agreement should not be used as a 'plea bargaining' tool, but is intended to provide certainty for the Complainant and the Member.

Definition

A Consensual Disposal is an agreement between the Member and the Association, by which it is agreed that a complaint can be resolved without the need for a hearing by a Professional Conduct Panel (PCP). Any agreement is subject to the criteria outlined below.

Professional Conduct Procedure 2018

Paragraph 3.4 of the PCP 2018 allows for certain matters to be disposed of by way of Consensual Disposal.

The Complainant

If the Case Manager decides to refer a complaint to the Investigation and Assessment Committee (IAC), in line with paragraph 2.8 of the PCP, the Case Manager will make the Complainant aware of the Consensual Disposal Protocol and that it may be used to resolve a complaint. The IAC will be made aware but won't be bound by the Complainant's views or objection to the consensual disposal. Any decision made is solely a matter for the IAC.

The Formal Proposal

The IAC may allow the Consensual Disposal, taking into consideration the following:

- a Consensual Disposal will follow a written request from the Member. This request may follow an invitation from the IAC or be initiated by the Member;
- the Member's request should contain a statement of the relevant facts and appropriate admissions;
- the Member's request should contain evidence of remorse, insight and genuine learning on their part;
- the IAC should be satisfied that a Consensual Disposal is in the public interest and that the public interest does not require any allegations, whether or not admitted, to proceed to a hearing;
- the IAC will consider what sanction, if any, should be imposed as part of the Consensual Disposal Agreement. The Member will have the opportunity to review that Agreement and accept the sanction. If the member does not accept the sanction, the matter will proceed to a Professional Conduct Hearing.

Process for the offer of a Consensual Disposal

This offers guidance on the general process to be followed where there is an invite by the IAC to enter into a Consensual Disposal.

1. The IAC may invite the Member, through the Case Manager, to submit a request and proposal for a Consensual Disposal.
2. The IAC may instruct the Case Manager to write a 'Without Prejudice' letter to the Member. This letter should indicate the terms under which the Consensual Disposal would be accepted and will include the following:
 - the background of the complaint, including the relevant facts which have been, or are to be, admitted;
 - the allegations made against the Member;
 - the admissions which have been, or are to be, made by the Member to the formal allegations;
 - the conclusion or outcome which should include the sanction to be determined by the IAC. In some cases, this may include voluntary removal from membership;
 - any mitigation to be considered by the IAC.
3. In the case that the IAC invite consensual disposal the IAC will discuss and decide upon the proposed sanctions which will be written up by the clerk in a draft consensual disposal agreement to provide to the member along with the covering letter.
4. The Member will have 28 days to consider the IAC's invite and confirm to the Case Manager whether they accept the invite or not.
5. If the Member does not respond to the IAC's invite within the 28 days, it will be assumed that the Member does not wish to enter into a Consensual Disposal and the matter will be referred for a Hearing.
6. A request by a Member, to extend the 28-day period to consider the IAC's invite, should be made in writing to the Registrar. An extension will only be granted in exceptional circumstances.
7. Where the Member responds within the 28 days to the IAC's invite, accepting the invite and the terms proposed by the IAC, the formal Consensual Disposal agreement will be drafted.

8. The Member must return the agreement to the Case Manager within seven days of receipt. If the Member does not do so, the Case Manager may give written notice of a final deadline for re-submission, after which the opportunity for Consensual Disposal may be withdrawn.
9. The Case Manager can consider changes proposed by the Member to the terms of the proposal which are not substantive in nature or do not affect the substance of the allegations or the admissions made, and make revisions to the draft.
10. The Member may add to or expand on the particulars of mitigation in the draft. The IAC will decide whether to accept the mitigation and include it in the Consensual Disposal proposal. In particular, the mitigation should not seek to undermine the admissions being made and should be capable of disclosure.
11. On receipt of a signed and dated Consensual Disposal proposal, the IAC will formally consider whether to accept it. If the proposal is accepted, it will be counter-signed and dated by the Chair of the IAC as a Consensual Disposal decision.

Process for considering a Member's request for Consensual Disposal

This offers guidance on the general process to be followed where the Member makes a request to enter into a Consensual Disposal.

1. When responding to formal allegations or at such other time allowed by the IAC, a Member can request to have the matter dealt with by way of a Consensual Disposal.
2. The Member's request should include details of the facts/allegations they admit to and any other representations they wish to make.
3. The IAC will consider the request and decide whether to accept or refuse the request.
4. Where the IAC refuse:
 - i. The Member will be notified that the IAC has not accepted the request and its reasons for this;
 - ii. The Member and Complainant will be notified that the matter will proceed to a hearing.
5. Where the IAC accept the Member's request, it will draft the Consensual Disposal Agreement setting out the terms of the proposal and will include;

- the background of the complaint, including the relevant facts which have been, or are to be, admitted
 - the allegations made against the Member
 - the admissions which have been, or are to be, made by the Member to the formal allegations
 - the conclusion or outcome which should include the sanction to be determined by the IAC. In some cases, this may include voluntary removal from membership
 - any mitigation to be considered by the IAC
6. The Member will have 28 days to consider the draft Consensual Disposal and return it to the Case Manager.
 7. The Case Manager can consider changes proposed by the Member which are not substantive in nature or do not affect the substance of the allegations or the admissions made, and make revisions to the draft.
 8. The Member must resubmit the amended proposal to the Case Manager within seven days of receipt. If the Member does not do so, the Case Manager may give written notice of a final deadline for re-submission, after which the opportunity for Consensual Disposal may be withdrawn.
 9. The Member may add to or expand on the particulars of mitigation in the draft. The IAC will decide whether to accept the mitigation and include it in the Consensual Disposal proposal. In particular, the mitigation should not seek to undermine the admissions being made and should be capable of disclosure.
 10. If the Member does not respond to the Consensual Disposal proposal within the 28 days, it will be assumed that the Member no longer intends to enter into a Consensual Disposal and the matter will be referred for a Hearing.
 11. A request by a Member to extend the 28-day period to consider the Consensual Disposal proposal should be made in writing to the Registrar. An extension will only be granted in exceptional circumstances.
 12. On receipt of a signed and dated Consensual Disposal proposal, it will be counter-signed and dated by the Chair of the IAC as a Consensual Disposal decision.

The Consensual Disposal Agreement

13. The Consensual Disposal decision will:
 - be in writing
 - be agreed by BACP and the Member
 - state the relevant facts as admitted
 - identify any admitted failings
 - include any mitigation accepted by the IAC
 - confirm the sanction imposed
 - be signed and dated by BACP and the Member
14. The Consensual Disposal decision will be published in line with the Publication Policy.
15. If the complaint is disposed of by way of Consensual Disposal, there will be no full Panel Hearing. However, the agreement is deemed to be a disciplinary decision, which will be a matter of record and will be notified to the Complainant.
16. If the IAC impose a sanction as part of the Consensual Disposal, it will be monitored by a Sanction Panel.
17. If an agreement on a Consensual Disposal proposal cannot be reached, the matter will proceed to a full Panel Hearing which will address all formal allegations. The Panel will have all options open to it when imposing any sanction.
18. In circumstances where the matter proceeds to a Hearing, all communications that have been written on a 'without prejudice' basis, including those which are clear negotiations relating to a Consensual Disposal but not titled 'without prejudice', will not be allowed into evidence by the Member or BACP. Any discussions regarding the content of the Consensual Disposal are solely between the IAC and the Member.
19. The parties must not provide any subsequent Hearing Panel with information concerning communications relating to a Consensual Disposal.

‘Without prejudice’ communications

Written or oral communications made in a genuine attempt to resolve a complaint will be protected by the ‘without prejudice’ rule. This means that those communications cannot be used as evidence if matters progress to a full Panel Hearing.

‘Without prejudice’ applies to communications which relate to negotiations genuinely aimed at a settlement between the parties, by way of a Consensual Disposal.

The rationale is that this will encourage parties to speak freely, in the knowledge that anything they say to try to settle the matter, in particular any admissions, will not be used against them if the settlement discussions fail.

The only circumstance in which BACP communications can be ‘without prejudice’, is in the context of Consensual Disposal cases. In any other context, this means that even if correspondence is headed as ‘without prejudice’ by Members, it will not necessarily be considered as without prejudice.

Notifying the Complainant

Once the terms of the Consensual Disposal have been agreed and signed off by the Member and the IAC, the Complainant will be notified of the decision and the terms of the Consensual Disposal.

Breach of a consensual disposal

Any material breach of the terms of the Consensual Disposal agreement by the Member may result in termination of their membership. Such a decision will be published.