



February 3, 2022

Dear Marina,

**RE: CMO Review of Alternative Dispute Resolution**

In speaking with you, I understand that the CMO is reviewing its Alternative Dispute Resolution (ADR) processes. Please find below the AOM's submission to the College regarding its ADR processes. This feedback has been gathered from members of the AOM as well as legal counsel acting on behalf of our members, who regularly appear before the College. Some of this is feedback you and I have discussed, but I have included it here for your reference.

The AOM would respectfully suggest that the College consider implementing a nominal change to its process that will encourage more members to participate in ADR. The College's Guide to Alternative Dispute Resolution states that "Complaints resolved through ADR are kept on the member's internal record and are considered in the assessment of any future complaints or reports made about the member." This information informs a member's decision when considering whether or not to participate in ADR.

The AOM's perspective is that the inclusion of ADR outcomes in a member's prior history is not supported by the legislation and acts as a disincentive for members to participate in ADR. The Association supports the exclusion of ADR outcomes from a member's prior history record in a future complaint or investigation.

Arguably, ADR outcomes/resolutions should not be included in a member's prior history record with the College. This is supported by s. 26(2) of the *Health Professions Procedural Code* which provides that when a panel of the Inquiries, Complaints and Reports Committee (ICRC) is investigating a complaint or considering a report, it shall consider "all of its available prior decisions" involving the member.

An ADR resolution, particularly complaint matters which are sufficiently low-risk to be approved by the Registrar, are not a prior decision of the ICRC. It is appropriate and consistent with the legislation for ADR outcomes to not form part of the member's prior history record with the College. Doing so is consistent with the public interest since ADR is reserved for complaint matters that present low risk or no risk to the public. Under the legislation, ADR is intended to be conducted "without prejudice." Without prejudice ADR encourages parties to engage in frank and open communication and offer concessions, without the concern or risk that such acknowledgments may be relied on in a subsequent legal proceeding, including before the College.

A midwife who participates in an ADR process does so on a without prejudice basis under the legislation; in this context, a member may be willing to agree to an outcome, such as an apology or voluntary practice changes, that potentially could not or would not be ordered by the ICRC. In our view, midwives become discouraged from participating in ADR when they are made aware that an acknowledgment, apology or other resolution offered in an ADR may be considered by the ICRC in a subsequent complaint or investigation, as this leads to a concern that the resolution offered may be taken or interpreted by a future ICRC panel as an acknowledgment of wrongdoing in a matter that would reasonably and fairly, outside of the ADR process, have otherwise resulted in no action being taken by a panel of the ICRC. In summary, the AOM's view is that excluding ADR outcomes from a member's prior history record may promote greater participation in ADR and, in turn, encourage and facilitate the resolution of a higher number of complaints via ADR.

We encourage the College, either via its ADR Guide or in the information supplied via the mediator, to inform the parties of their option to include agreed upon facts or a brief summary of the complaint in the final written ADR resolution agreement, so that a future ICRC panel has the necessary and appropriate context when weighing an ADR resolution for the purposes of a future complaint or investigation.

Finally, we also encourage the College to engage a broader roster of mediators to facilitate its ADR processes. The AOM has received feedback that it would benefit the process for the College to have multiple mediators with diverse mediation styles. In addition to shuttle telephone mediation, which is frequently used, the Association encourages mediators, in appropriate cases, to offer the parties of the option of a half-day virtual video mediation session, which has the benefit of requiring the parties to set aside time to the ADR process, and which can often promote and facilitate a more expedited resolution.

Thank you for the opportunity to provide feedback on the College's ADR processes.

Sincerely,

A handwritten signature in black ink that reads "Allyson Booth". The signature is fluid and cursive, with the first name "Allyson" and the last name "Booth" clearly distinguishable.

Allyson Booth, RM  
Director, Quality and Risk Management

Cc: Kelly Stadelbauer, Executive Director, AOM