

Mediation Guidelines

Introduction

The Commonwealth Ombudsman in their capacity as the Private Health Insurance Ombudsman (PHIO) has legislative power to invite or require health insurers and healthcare providers to attend mediation, in order to resolve disputes that may affect consumers' rights and entitlements under their private health insurance cover. These disputes usually occur when there is disagreement between a health insurer and a hospital provider about the renewal of a hospital agreement.

The Office of the Commonwealth Ombudsman (the Office) has developed these guidelines to assist in assessing whether mediation of a complaint is required and the process for facilitating this process. Generally, the Office's view is that voluntary mediation will be considered first and compulsory mediation is a last resort, to be used only when all other avenues have been exhausted.

The guidelines were developed by the Office through public consultation conducted in December 2019 with submissions provided by a range of parties in the private health insurance industry.

Background

The Ombudsman's mediation powers are set out in Part IID, Division 5 of the *Ombudsman Act 1976* (the Act).

Under s 20X, the Ombudsman may conduct mediation between the parties to a complaint. Under s 20Y, the Ombudsman may direct the parties to the complaint to participate in mediation.

Under ss 20ZA, 20ZC, the Ombudsman may conduct mediation, or appoint a third party to conduct mediation.

The Ombudsman reserves the right to decide, on a case by case basis, whether to conduct mediation. The Office's involvement in contractual issues between health insurers and healthcare providers is subject to whether there is likely to be a significant impact on consumers' rights under private health insurance arrangements.

In this context, s 20M (5) (g) of the Act provides that the Ombudsman may decide not to deal with a complaint, or continue to deal with a complaint, if the complaint is mainly about commercial negotiations.

The purpose of mediation is to assist the parties to reach a position where direct negotiation between them is likely to resolve the matter. Mediation does not involve the Ombudsman ruling on the relative merits of the parties' negotiating positions or the prices they are seeking to pay or receive. Commercial and competition issues fall within the jurisdiction of the Australian Competition and Consumer Commission (ACCC), which regulates the *Competition and Consumer Act 2010*. The ACCC is the most appropriate body to deal with complaints about these issues.

The Act sets out a number of requirements for mediation under s 20Y and these have been incorporated into these guidelines.

Mediation processes

Voluntary mediation

Where the Office is notified of a complaint in relation to a Hospital Agreement that may potentially require mediation, the Office will discuss the matter with the complainant and provide advice on any relevant issues. This includes ensuring processes are put in place to protect consumers' interests, in the event that a decision is made to terminate an Agreement between a hospital and a health insurer.

The Office will also refer the complainant to *Termination and Transition Guidelines for Hospitals and Insurers*, available at ombudsman.gov.au.

Prior to taking further action, the Office will request information in writing from the complainant about the issues in dispute. The Office will also require that the matter has been escalated to a senior level with the other party to the complaint, and that any dispute resolution processes under the contract have been exhausted.

Once information has been provided in writing, the Office will seek information from the other party to the complaint. The Office may decide to meet with one or other of the parties to discuss the issues of concern further.

The Ombudsman may then decide to bring the parties together on a voluntary basis to try and effect a resolution by mediating between the parties.

If the Ombudsman decides to mediate a complaint, they must have the complainant's agreement to do so and cannot continue to mediate if the complaint is withdrawn.

Compulsory mediation

The Ombudsman may decide to direct the parties to participate in compulsory mediation.

In deciding whether to give a direction under s 20Y(1) of the Act, the Office will also consider whether the parties have already participated in mediation, whether the mediation was unsuccessful and whether avenues for dispute resolution under the contractual arrangements have been utilised.

If the Ombudsman decides there is a case for compulsory mediation, the Office will write formally to each party and give 14 days' notice of the requirement to attend mediation. Information about the subject of the complaint and the place of the mediation will also be provided.

If the Ombudsman directs the parties to participate in compulsory mediation, the Office expects the parties to act in good faith and in the interests of consumers in trying to achieve a resolution of the dispute.

Under s 20Y(4) of the Act, it is an offence for a party not to participate in mediation if so directed by the Ombudsman.

Mediation will cease if the parties agree to a resolution of the matter, or the Office concludes that the matter cannot be settled by mediation.

Conduct of mediation

The Act provides for the Ombudsman to conduct mediation, or to appoint a third party mediator. The Office will consult the parties regarding the appointment of the mediator, but will ultimately make the decision about the appointment.

The Office will cover the cost of the mediation, including venue hire and mediator's fees. Costs of limited catering will be met at the Office's discretion depending on the requirements of the mediation day and location.

Parties to the mediation will be responsible for their own travel costs and the costs of any support personnel that attend the mediation.

Once a mediator is appointed, they are responsible for deciding on the arrangements for the mediation, including whether legal representatives may be present at the mediation and informing the parties of any issues relating to the conduct of the mediation.

Under s 20ZB of the Act, anything said or any admission made in mediation is not admissible in any court or in any proceedings before a person authorised by law to hear evidence.

Outcome of mediation

A third party mediator appointed by the Office to conduct mediation must report to the Ombudsman, as soon as practicable after mediation is conducted, on the outcome of the mediation. This report must include the terms of the settlement, if the parties agreed to settle the complaint. If the parties were unable to reach agreement, the report must include the reasons that the mediation failed.

Once this report is received, the Office will write formally to the parties setting out their understanding of the agreed settlement and timeframes. The letter will request a report from the parties outlining any action taken to comply with the terms of the settlement, within 14 days of the date of the letter.

The Office will monitor the outcome of the mediation to ensure the parties comply with terms of the settlement and undertake any agreed action.

In the event of non-compliance with the settlement, the Ombudsman may make a formal recommendation to the non-compliant party. The Ombudsman may report to the Minister for Health and make a recommendation to the Minister under s 20V, following a s 20T own motion investigation. The Ombudsman may report on the outcome of mediation in its public reports.

Agreement cessation during mediation

In the interests of consumers, the Office's position is that an agreement which is in place between an insurer and a hospital should remain in effect if the Ombudsman decides to mediate the complaint (through either voluntary or compulsory mediation) until the matter is resolved, or it is clear that a resolution cannot be achieved via mediation.

For example, in a case where one party has issued a 30-day notice of termination, the countdown to the termination of the agreement should be paused for the duration of the mediation process and will not resume until the mediation is completed.

Timeliness

Contractual negotiations are usually conducted within tight timeframes. It is important that issues requiring mediation by the Office are dealt with in a timely manner.

The Office will prioritise any complaints brought to the Office and will expect insurers and healthcare providers to provide timely responses to requests for information. Ideally, responses should be provided to the Office within one or two business days.

Additional information

For a summary and flowchart of the mediation process, please see Attachment A: "Mediation Process".

For additional information about PHIO's mediation role, please see Attachment B: "Frequently Asked Questions".

Information can also be obtained by contacting the Commonwealth Ombudsman:

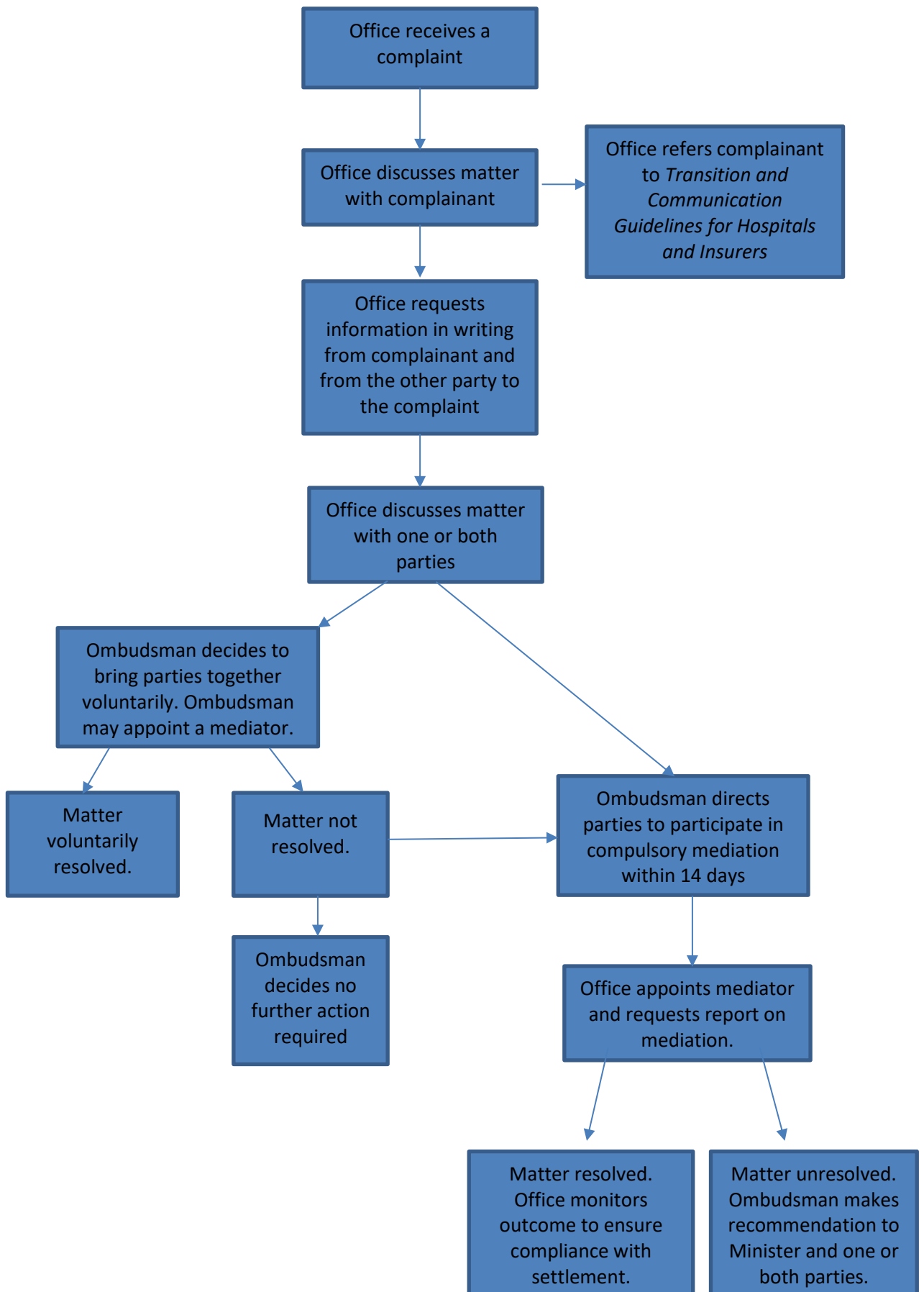
Online: Visit ombudsman.gov.au and privatehealth.gov.au

Email: phi@ombudsman.gov.au

In writing: GPO Box 442, Canberra ACT 2601

Phone: Call 1300 362 072 between 9am and 5pm (AEDT) Monday to Friday.

Attachment A: Mediation Process



Attachment B: Mediation FAQs

What is the Ombudsman's mediation role?

The Private Health Insurance Ombudsman has legislative power under Part IID, Division 5 of the *Ombudsman Act 1976* (the Act) to settle a complaint by mediation.

This mediation power is used primarily to resolve disputes between health insurers and healthcare providers that may adversely affect consumers' entitlements under their health insurance. This usually occurs when there is a dispute between a health insurer and a hospital provider about the renewal of a hospital agreement.

In order to protect consumers who may be adversely affected by an out-of-contract situation, the Ombudsman is able to use its mediation power to assist in resolving the issues in dispute.

The aim of mediation is to assist the parties to reach a position where direct negotiation between them is likely to resolve the matter. It does not involve the Ombudsman ruling on the relative merits of the parties' negotiating positions or the prices they are seeking to pay or receive, which would not be considered an appropriate role for an Ombudsman.

What is a hospital agreement?

A hospital agreement is a contract negotiated between a health insurer and a private hospital or hospital group for the provision of hospital services at an agreed price.

If a health insurer and a hospital are not able to reach agreement about a new contract and the existing contract is terminated, members of the health insurer attending that hospital will not be fully covered and will usually incur substantial out-of-pocket costs.

Hospital agreements may also be referred to as 'hospital contracts' or 'Hospital Purchaser Provider Agreements' (HPPAs).

What should I do if I have a dispute about the re-negotiation of a hospital agreement?

The Office can give general advice to staff of health insurers and healthcare providers about the Ombudsman's mediation role in the event that a hospital agreement is terminated or not renewed.

In addition to the *Mediation Guidelines*, the Office's *Termination and Transition Guidelines* is recommended reading for any organisation that is considering going out of contract with a health insurer or healthcare provider. The *Termination and Transition Guidelines* outline arrangements agreed within the private health industry to ensure adequate consumer protection and minimise undue disruption and risk to the industry when contractual agreements between health funds and hospitals are terminated.

This document can be found under the Private Health Insurance – Industry Resources section of ombudsman.gov.au.

Can I ask the Ombudsman to investigate my concerns about the rates I'm being paid by an insurer?

Benefits paid by insurers to private hospitals are agreed between the parties through a process of commercial negotiation. The Office does not have a role or regulatory power to require insurers to pay particular levels of benefit to private hospitals.

Under legislation, the Ombudsman may decide not to deal with a complaint if the complaint is mainly concerned with commercial negotiations. The Office's involvement in contractual issues between health insurers and healthcare providers is subject to whether there is likely to be a significant impact on consumers' rights under private health insurance arrangements.

Complaints about possible breaches of the *Competition and Consumer Act 2010* fall within the jurisdiction of the [Australian Competition and Consumer Commission](#), which regulates this Act.