

## HPC's Policy for the Provision of Legal Advice

### Introduction

The paper is divided into five sections.

- Section I Details the areas where legal advice is required by HPC
- Section II Describes how HPC prepares cases
- Section III Reviews the costs of providing legal advice
- Section IV Advantages and Disadvantages of providing in-house legal advice
- Section V Recommendations

## Section I – Areas requiring legal advice

Twelve key areas have been identified where HPC requires legal advice. In alphabetical order they are as follows:-

1. Article 37 - Appeals
2. Article 39 - Offences
3. Commercial contracts
4. Employment law
5. Fitness to practise
6. Information
7. Legal assessors
8. Other specialist legal advice
9. Parliamentary Agents
10. Public law
11. Section 29 CHRE
12. Training

### 1. Article 37 - Appeals

Article 37 of the Health Professions Order 2001 requires the HPC to manage two types of appeal process. They are decisions of the Education and Training Committee, for example decisions to withdraw approval of courses and decisions of the Registration Committee for example grandparenting or international registration applications decisions.

Bircham Dyson Bell provides legal advice to the Council in relation to these types of appeals.

### 2. Article 39 – Offences

Since 9<sup>th</sup> July 2005 HPC has had the power to prosecute individuals who have committed a criminal offence under Article 39 of the Health Professions Order 2001.

Bircham Dyson Bell provides legal advice to the Council in relation to these type of cases.

### 3. Commercial Contracts

When the HPC enters into significant commercial arrangements with other organisations, legal advice is sought before entering into a contract. Examples include: IT software projects, building or refurbishment work, and the purchase of land and buildings.

Since April 2001 HPC has used the services of Bircham Dyson Bell.

### 4. Employment Law

Due to the ever increasing complexity of employment law the HPC requires specialist HR legal advice. The type of advice sought covers: employer/employee disputes, job applicants, ex-employees, Partners and Council members.

HPC currently uses Kingsley Napley. Kingsley Napley are not contracted to provide and have been engaged on an hourly basis.

As in other legal situations, barristers and QCs may be engaged for specific cases.

It is not the intention of the Executive to establish an in-house resource.

### 5. Fitness to Practise

It is forecast that the number of Fitness to Practise tribunal days will increase. This is due to three factors. They are as follows:

- Increase in number of registrants as aspirant groups become statutorily regulated by HPC.
- Increase in the number of Fitness to Practise allegations due to an increased awareness of HPC and its ability to act swiftly and appropriately.
- Increase in the length of Tribunals due to the number of competence cases.
- Review orders.

The HPC currently engages external legal services to prepare and present allegations against registrants at Conduct and Competence Tribunals, Health Tribunals and Interim Orders.

Currently all of HPC Fitness to Practise cases are prepared and presented by Kingsley Napley, based at St John's Lane, London EC1.

However, the Fitness to Practise Department has been reducing their reliance on Kingsley Napley.

- Non-complex interim orders are being presented by HPC case managers. For example evidence of registrants serving custodial sentences.
- Certain conduct cases are being presented to HPC tribunals by HPC case managers.
- In Scotland and Northern Ireland, local barristers are engaged to present Fitness to Practise cases.

It is the intention of the Executive to continue to exclusively engage Kingsley Napley to prepare and present fitness to practise cases until spring 2006.

The HPC has a Service Level Agreement with Kingsley Napley.

#### 6. Information

The HPC has on occasions sought legal advice on Data Protection and the Freedom of Information Act.

#### 7. Legal Assessors

Article 34 of the Health Professions Order 2001 requires HPC to appoint legal assessors.

As at 1<sup>st</sup> November 2004 HPC has engaged thirteen legal assessors. Of the twelve, three have been specifically retained to deal with Scottish issues and two with Northern Ireland issues.

It is anticipated that the number of legal assessors will be increased as the number of Fitness to Practise cases increases.

#### 8. Other specialist legal advice

It is assumed that the HPC may occasionally require specialist legal advice on a range of issues. Examples include: environment, planning, rates and tax.

It is the intention of the Executive to engage specialist legal advice as required.

#### 9. Parliamentary Agent

HPC continues to require advice from a Parliamentary Agent. This is to enable the Health Professions Order 2001 and the consequential HPC rules to be amended in a swift and economic manner.

Bircham Dyson Bell, based at 50 Broadway, London SW1, currently provides this service to the HPC.

The HPC has a Service Level Agreement with Bircham Dyson Bell.

It is the view of the Executive that periodically the provision of these types of legal services should be put out for competitive tendering. It is proposed that such an exercise should be undertaken during the financial year 2006/7 and be completed so that contracts can be approved by the Council before 1<sup>st</sup> April 2007.

10. Public Law

Advice on public law is provided to HPC by Bircham Dyson Bell.

11. Section 29 CHRE

The Council for Healthcare Regulatory Excellence (CHRE) has the power and does refer HPC's conduct and competence and registration restoration panel decisions to the courts where they believe that the panel has been too benign.

As and when such cases arise legal advice will not be sought from the lawyers who presented the case but will be provided by Bircham Dyson Bell. It is assumed that this process will occur two to four times per year.

It is not the intention of the Executive to change this policy.

12. Training

Specific training is required to educate a range of HPC's Council members, Partners and employees on their roles and responsibilities as defined by the Health Professions Order 2001, the HPC rules and other legislation.

To date this type of training has been predominantly provided by Jonathan Bracken of Bircham Dyson Bell.

## Section II – Case Preparation

The Council for Professions Supplementary to Medicine (CPSM) case preparation policy was to assign the complete disciplinary process to external lawyers. This covered not only case preparation and presentation but also the majority of day-to-day managerial function such as the drafting and sending of all communications.

The HPC has instigated a radically different case preparation policy. When expert legal advice is not required then the work is undertaken in the Fitness to Practise Department. This:-

- Reduces spend on external legal fees on non-legal tasks.
- Improves the quality, consistency and speed of HPC service.
- Captures economies of scale.

In addition, it is anticipated that the Fitness to Practise Department will take on additional tasks such as obtaining witness statements.

### Section III – Costs

HPC requires expert legal advice to enable it to deliver its Strategic Intent.

The HPC Budget for 2006/2007 for the Fitness to Practise Department and Legal Services is as follows

Budget		
	£	%
Fitness to Practise Department (excluding legal expenses)	1,080,215	10
Legal Expenses		
Fitness to Practise	1,254,000	11
Rest of Organisation	26,000	
Legal Advice		
Fitness to Practise	188,220	2%
Rest of Organisation	130,500	1%
Legal Assessors (including expenses)	64,976	1%
Fitness to Practise Budget	2,587,411	23%
Total HPC income	11,208,971	100%

It should be noted that overhead costs such as IT and Office Services are not included.

In addition, it should be noted that both the Foster and Donaldson reviews may result in regulation of assistants and the consolidation of the nine UK regulators of health professionals which may lead to significant changes to these figures.

## Section IV – Advantages and Disadvantages of providing in-house legal advice

Given the range of legal advice required by the HPC and the cost of providing the advice, how should HPC proceed?

There are two key questions. They are as follows:

- (i) Should the HPC employ lawyers to undertake work in-house, in particular fitness to practise cases?
- (ii) Should we increase the number of organisations providing Fitness to Practise legal advice to HPC?

The advantages and disadvantages have been assessed as follows.

Should HPC employ lawyers in-house to prepare and present Fitness to Practise cases?

### Advantages

- Lower labour costs.
- Build in-house expertise.

### Disadvantages

- In-house lawyers may get personally involved in decisions to proceed with cases.
- Easier to disengage poor service provider rather than underperforming employee.
- In-house team may seek to use external lawyers to “belt and brace” decisions.
- In-house lawyers will have reducing exposure to non-HPC cases.
- Inability to rapidly increase amount of cases that HPC would be able to process.
- Increased indirect costs, such as office services.
- Unattractive career opportunity to ambitious lawyers.

Should we increase the number on Fitness to Practise legal teams rather than relying exclusively on Kingsley Napley?

### Advantages

- Provides cost comparison.
- Provides service comparisons.
- Increase in short term capacity.
- Increases breadth of legal advice and experience.

### Disadvantages

- Reduces the ability to negotiate lower costs from single provider.

- Inconsistency in presentation of cases and differing approaches to case work.
- Need to build relationship with more than one provider.

## Section V - Recommendations

Three principles are being used by HPC when using legal advice. They are as follows:

- (i) HPC will not directly employ solicitors for either Fitness to Practise Tribunals and or other areas where legal advice is required.
- (ii) HPC Fitness to Practise Department will continue to expand its responsibility to present cases to Tribunals where extensive legal expertise is not required.
- (iii) The percentage of work related to case preparation being undertaken by the HPC Fitness to Practise will gradually increase.

In addition:

- (i) The policy for the provision of legal advice will be reviewed by the Council during the first quarter of 2006.
- (ii) An Invitation to Tender document will be prepared and issued seeking the provision of the services of a Parliamentary Agent and the provision of legal services associated with HPC's Fitness to Practise process. The exercise will be completed so that contracts can be approved by the Council before the start of the 2007/2008 financial year on 1<sup>st</sup> April 2007.