

Audit Committee 29 September 2009

Fitness to Practise Audit report

Executive summary and recommendations

Introduction

In accordance with the proposals agreed by the June 2009 meeting of the Audit Committee, PKF are currently undertaking a series of reviews in relation to the fitness to practise department. The first of those reviews is attached and focuses on the management of the key risks.

Decision

The Committee is asked to discuss the attached audit report

Background information

None

Resource implications

None

Financial implications

Accounted for in 2009/10 budget

Appendices

PKF Audit report

Date of paper

16 September 2009



Health Professions Council

**Fitness to Practise - Key Risk
Management 2009/10**

Final September 2009

Confidential



Accountants &
business advisers

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Project timescales

Date project commenced	03/08/09
Date field work completed	03/09/09
Date draft report issued	03/09/09
Date final management comments received	
Date final report issued	

1 Introduction and scope

1.1 In accordance with our proposals agreed by the June 2009 meeting of the Audit Committee, we are undertaking a series of reviews during 2009/10 of the Health Professions Council's ("HPC's") arrangements in relation to fitness to practise. This review is the first of these reviews and as agreed focuses on the management of the key risks in relation to this area.

Scope of our work

1.2 As specified in our audit programme the aim of this project was to provide assurance to the HPC regarding its arrangements for managing its key risks in relation to fitness to practise.

1.3 Specifically these arrangements included:

- Legal advice and ISO assurance;
- Quality of legal advice;
- Communications;
- Legal insurances; and
- Financial planning, forecasting and budget management.

1.4 The work was carried out primarily by holding discussions with relevant staff and management, reviewing any available documentation and undertaking detailed testing on a sample basis, where required. The audit fieldwork was undertaken in August and September 2009.

1.5 This report has been prepared as part of the internal audit of the Health Professions Council under the terms of our engagement letter for internal audit services. It has been prepared for the Health Professions Council and we neither accept nor assume any responsibility or duty of care to any third party in relation to it.

1.6 The conclusions and recommendations are based on the results of audit work carried out and are reported in good faith. However, our methodology is dependent upon explanations by managers and sample testing and management should satisfy itself of the validity of any recommendations before acting upon them.

2 Executive summary

- 2.1 This report summarises the work undertaken by PKF within the agreed scope of our review of the HPC's arrangements for managing its key risks in relation to fitness to practise. The work was performed as part of our agreed internal audit plan for 2009/10.

Background

- 2.2 Management estimates that over 800 fitness to practise cases will be managed by the HPC during 2009/10. Failure to put into place procedures that are consistent with legal requirements and to comply with these procedures when managing fitness to practise cases may leave the HPC exposed in the event of a legal challenge. Legal expenses are a significant area of expenditure. Failure to keep these costs under control and exceptional costs to a minimum could have a significant impact upon the HPC's finances.

Our assessment

- 2.3 Based on the audit work carried out we concluded that the HPC's arrangements for managing its key risks in relation to fitness to practise were satisfactory and operating effectively at the time of our review. We noted that most aspects of the arrangements were sound and met best practice. However, the ISO quality assurance process needs to be (and is being) enhanced to provide the level of assurance required to meet best practice in full.

Principal findings

- 2.4 The key controls that the HPC is relying upon to mitigate the risk of legal challenge are the appointment of expert legal advisors, clear guidance on communication of decisions, management checks on compliance with operational procedures and ISO quality assurance.
- 2.5 We noted that a thorough selection process was undertaken to appoint appropriate legal advisors and that this was approved by the Finance & Resources Committee and Council. Service level agreements that include service standards, together with an annual process for assessing the HPC's satisfaction with these advisors were also in place.
- 2.6 We were advised by management that the HPC is satisfied with the quality of service that it has received from its legal advisors since their appointment and that there have not been any issues that have arisen that have caused the HPC to be concerned about the quality of the legal advice that it has received.
- 2.7 Our review indicated that clear guidance was in place in relation to the communication of decisions following investigations and hearings.

- 2.8 Management informed us that the HPC's legal advisers supported the organisation in the development of these arrangements, which have been recently reviewed and updated and are due to be considered by Council in October 2009.
- 2.9 We understand that checks are undertaken by Lead Case Managers who review case files on a monthly basis and through day to day line management review processes and that these controls have been highlighted by the Council for Healthcare Regulatory Excellence ("CHRE") as good practice. We are advised that the HPC has a process through which one individual "case manages" a case and a different case manager or a Kingsley Napley advocate reviews the case work. They then take on the task of presenting the case at the hearing enabling any review issues to be picked up.
- 2.10 The HPC has also established an ISO quality assurance process that has been certified as meeting the requirements of ISO 9001:2008. The value of ISO is that it provides guidance and structure to employees within both the Fitness to Practise Department and within the organisation as a whole. A programme of ISO quality assurance reviews is undertaken based upon detailed documentation in flow chart format of the HPC's various fitness to practise procedures and testing to confirm that these are indeed being followed. However, as we have noted above these arrangements need to be (and are being) enhanced to meet best practice in full. We have not therefore raised a recommendation in relation to this matter.
- 2.11 The principal controls that the HPC is relying upon to mitigate the impact of exceptional legal costs include financial management controls such as forecasting, budget setting and budgetary control, together with insurance against exceptional costs and a cap on the maximum numbers of hours that can be charged on an annual basis, as agreed with Kingsley Napley, the HPC's principal legal advisors.
- 2.12 Our review indicated that these controls were operating effectively, although we noted that to date the value of a potential individual claim for legal costs cover by HPC has not exceeded the £125,000 excess threshold and the HPC has not needed to make a claim under its policy. However, whilst the policy is in place if costs were to exceed the threshold the HPC would be able to reclaim up to £125,000 thereby enabling the organisation to mitigate its financial exposure to exceptional legal costs. We have not therefore raised a recommendation in relation to this area.
- 2.13 We wish to thank all members of staff for their availability, co-operation and assistance during the course of our review.

PKF (UK) LLP
September 2009

3 Detailed findings

Background

- 3.1 A key function of the HPC's Fitness to Practise Department is the investigation of allegations to the effect that a registrant's fitness to practise is impaired and the management of cases through to their conclusion. Management estimates that in total over 800 cases will be managed by the HPC during 2009/10.
- 3.2 The procedures followed are quasi-legal in nature and cover witness liaison, instructing lawyers and preparing and presenting cases at investigating, interim order, final and review stage. Failure to put into place procedures that are consistent with legal requirements and to comply with these procedures may leave the HPC exposed in the event of a legal challenge.
- 3.3 The expenditure budget for the Fitness to Practise Department for 2009/10 amounts to just under £5.6 million, an increase around 22% from 2008/09, reflecting a forecast increase in casework now that practitioner psychologists have begun to be regulated by the HPC from 1st July 2009. Fitness to Practise Department expenditure now represents around 35% of the HPC's total annual expenditure budget.
- 3.4 Good quality legal advice is necessary to support the work of the HPC as it undertakes its regulatory functions in relation to each individual case. Legal expenses are therefore a significant area of expenditure. The HPC is budgeting to spend £2.2 million with Kingsley Napley and £180,000 with Bircham Dyson Bell in 2009/10, although the latter does not all relate to Fitness to Practise. Failure to keep these costs under control could have a significant impact upon the HPC's finances.

Key risks

- 3.5 The HPC identified the following risks as having a high inherent risk in its February 2009 risk register:
- Legal challenge to HPC operations (risk 13.2); and
 - Tribunal exceptional costs (risk 13.3).
- 3.6 The key management controls that the HPC is relying upon to manage these risks are set out in the risk register as follows:
- Quality of legal advice;
 - ISO assurance regarding compliance with operational procedures;
 - Communications; and

- Legal costs insurance.

3.7 Financial planning, forecasting and budget management are also important elements of the control framework in relation to this area.

3.8 The findings of our review of these controls are set out below.

Findings

Quality of legal advice

3.9 We noted that the HPC most recently undertook a formal review of the legal advice that it receives during 2006/07, with new contracts entered into with legal advisors from 1st April 2007. A formal tender exercise was undertaken in relation to all the various types of advice that the HPC requires except legal advice on employment legislation and general commercial advice, which were expressly excluded from these arrangements. The HPC's requirements are set out in the table below.

Public Law
Interpretation and development of the Health Professions Order 2001 and related Rules.
Relevant home country, UK, EU and International legislation
UK public law
CHRE Section 29 appeals
Freedom of Information Act
Advise and present registration appeals to Council
Advice relating to Data Protection Act and Freedom of Information Act
Specific Fitness to Practise
The preparation and presentation of Fitness to Practise cases.
High Court appeals arising from Fitness to Practise cases

3.10 The tenders received were assessed against the following criteria:

- Understanding of the HPC;
 - Experience of the service provider;
 - Cost; and
 - The proposed service level agreement between the provider and the HPC.
- 3.11 After a detailed evaluation against the above criteria of the submissions received from various legal firms and an interview process, the HPC decided to continue to retain Kingsley Napley in relation to fitness to practise tribunals and Bircham Dyson Bell as parliamentary agents to advise on matters such as compliance with the Health Professions Order 2001.
- 3.12 Our review indicated that the selection process was reviewed and approved by the Finance and Resources Committee and Council.
- 3.13 We noted that two service level agreements are in place between the HPC and its legal advisors, setting out the type of work to be undertaken, service standards and performance review arrangements.
- 3.14 We also understand that regular meetings are held with the client partner of each firm and formal meeting is held annually with the Managing Partner of Kingsley Napley to discuss service quality and the operation of the service level agreement.
- 3.15 We were advised by management that the HPC is satisfied with the quality of service that it has received from its legal advisors since their appointment and that there have not been any issues that have arisen that have caused the HPC to be concerned about the quality of the legal advice that it has received. We have therefore not raised a recommendation in relation to this area.

ISO assurance

- 3.16 We understand that checks are undertaken by Lead Case Managers who review case files on a monthly basis and through day to day line management review processes and that these controls have been highlighted by the CHRE as good practice. We are advised that the HPC has a process through which one individual "case manages" a case and a different case manager or a Kingsley Napley advocate reviews the case work. They then take on the task of presenting the case at the hearing enabling any review issues to be picked up.
- 3.17 The HPC has also established an ISO quality assurance process that has been certified as meeting the requirements of ISO 9001:2008. The value of ISO is that it provides guidance and structure to employees within both the Fitness to Practise Department and within the organisation as a whole.

- 3.18 A programme of ISO quality assurance reviews is undertaken based upon detailed documentation in flow chart format of the HPC's various fitness to practise procedures and testing to confirm that these are indeed being followed.
- 3.19 We noted that the most recent report provided by the HPC's ISO assessors ("BSI") in relation to fitness to practise was considered by the Audit Committee in April 2009. We noted that the report provided the following assurance.
- 3.20 *"The processes for assessing fitness-to-practise (both Investigations and Hearings) were assessed and appear to be effective from the theoretical description used. Some issues over confidentiality prevented actual sampling and these will need resolving before the next assessment of this area."*
- 3.21 We have therefore concluded that since not all of the HPC's operations could be subjected to testing by BSI, the HPC can only draw limited assurance from this work.
- 3.22 The confidentiality issues referred to above relate to the potentially sensitive data held as part of an investigation in relation to registrants and individuals raising a fitness to practise matter with the HPC. We are advised that for "live" cases that are subject to ongoing investigation and hearings the organisation has difficulty in providing all the data necessary to complete process testing for data protection reasons. We have therefore had similar discussions with management regarding data access ourselves in the past.
- 3.23 However, having explored the potential exposure to the HPC of sharing sensitive data with its auditors, including the BSI assessors, it has been agreed with management that closed cases can be subject to audit review where a confidentiality agreement is in place that forms part of the terms and conditions of the appointed auditors. This approach will form the basis of the detailed testing that we have agreed to undertake in October 2009, which we believe will provide the HPC with the assurances that it requires to be satisfied that its operational procedures are being followed. We have not therefore raised a recommendation in relation to this area.

Communications

- 3.24 We noted that detailed guidance has been prepared to advise HPC staff when communicating the outcomes and process steps arising from an investigation and hearing. These are set out in a series of Practice Notes covering all stages of the fitness to practise operational processes.
- 3.25 We understand that the risk of challenge to the HPC's operations arises primarily at the point where a fitness to practise decision is communicated to the registrant under investigation. For this reason a specific Practice Note - *Drafting Fitness to Practise Decisions* - has been produced recently and following review by the HPC's legal advisors

will be considered by the Council in October 2009. This will be used in conjunction with existing training notes and the HPC's Sanctions Policy.

3.26 Key areas covered by the Practice Note include:

- Details in relation to a decision to be communicated i.e. the findings of fact made by the panel and the conclusions arrived at by the panel and the ultimate decision;
- Drafting style of communicated decisions and subsequent orders and conditions e.g. striking off order, conditions of practice order; and
- Support available to the panel by the HPC's appointed Legal Assessor.

3.27 Compliance with the training notes and Sanctions Policy were previously subject to review through the ISO assessment noted above. The operation of the new Practice Note will be subject to a similar review through the ISO audit processes in the future. We have not therefore raised a recommendation in relation to this area.

Legal costs insurances

3.28 The HPC has an insurance policy with Abbey Legal Protection that provides cover against some of the legal costs incurred through its fitness to practise work. The policy covers the following expenses:

- Fees, expenses and disbursements reasonably incurred by the HPC's appointed legal representative with the HPC's consent;
- Costs incurred by the other parties to which the HPC is held liable in court or tribunal proceedings or which the HPC provides written consent to pay; and
- Fees, expenses and disbursements reasonably incurred by the HPC's appointed legal representative with the HPC's consent in an appeal of the judgement of a court or tribunal.

3.29 The policy includes an excess provision of £125,000 and cover is limited to £250,000 per individual claim or £500,000 in the aggregate per annum. The premium paid amounts to just over £30,000. The cover provided for an individual claim is therefore as follows:

Claim value/ cost amount £	HPC costs £	Insured amount £
Less than £125,001	£125,000	Nil
£125,001 to £250,000	£125,000	Up to £125,000
£250,001 to e.g. £400,000	£275,000	£125,000

- 3.30 The most recent policy was dated 6th April 2009 and provides annual cover from 1st April 2009 to 31st March 2010.
- 3.31 Our review indicated that the appointment of Abbey Legal Protection was made following a review of the available options by the HPC's insurance brokers – Lockton – following the withdrawal from providing this type of cover by the HPC's previous insurers Brlt.
- 3.32 Four organisations were invited to quote by Lockton for the HPC's insurance and Abbey Legal Protection was the only insurer to submit proposals.
- 3.33 Through our discussions of the insurance arrangements with management we noted that to date the value of a potential individual claim for legal costs cover by HPC has not exceeded the £125,000 threshold and the HPC has not therefore been able/ needed to make a claim under its policy. However, whilst the policy is in place if costs were to exceed the threshold the HPC would be able to reclaim up to £125,000 thereby enabling the organisation to mitigate its financial exposure to exceptional legal costs.
- 3.34 We also noted that following discussions of the service level agreement with Kingston Napley in March 2009, agreement was reached to place an annual cap upon the maximum number of chargeable hours to be incurred by these legal advisors in relation to fitness to practise tribunals with the exception of work in relation to the practitioner psychologists who have only recently begun to be regulated by the HPC and any work in relation to High Court Appeals. This arrangement provides a further mitigation against the HPC's exposure to exceptional legal costs. We have not therefore raised a recommendation in relation to this area.

Financial planning, forecasting and budget management

- 3.35 As part of the arrangements for developing the Fitness to Practise Department's work plan for the year a forecast is prepared of the likely numbers of cases, hearings and resources required in relation to fitness to practise activity. We noted that for 2009/10 this forecast was included in the departmental work plan. The principal assumptions of the forecast for 2009/10 are set out below:

Forecast area	
Total allegations to be managed	817
Total days of hearings	637
Time required per Case manager	210 working days

Time required per Hearings officer	210 working days
Time required per Administrator	210 working days

- 3.36 Our review indicated that the forecasts were based upon 2008/09 trend data together with estimates of any likely changes to workload arising during 2009/10.
- 3.37 These assumptions, together with estimates of the various individual costs associated with the fitness to practise processes (e.g. security costs per hearing based on prior year costs) feed in to the budget setting process and an excel spreadsheet that is used to build up the budgeted costs for the Fitness to Practise Department for the year.
- 3.38 The departmental budget is subject to the overall budget setting and budgetary control arrangements in place at the HPC. As is the case for all departmental budgets, the Fitness to Practise budget (and the underlying assumptions) is discussed and reviewed with the Chief Executive and Registrar and the Director of Finance in the first instance. The overall HPC budget is then collated and reviewed again before presentation to the Finance & Resources Committee and Council for approval.
- 3.39 Management accounts are produced monthly and include a detailed analysis of the performance against budget of each department. At the time of this audit, we noted that the expenditure incurred to date by the Fitness to Practise Department was broadly in line with budget. The management accounts are considered at the meetings of the Executive Management Team ("EMT") and quarterly by the Finance & Resources Committee and Council. As part of the budget monitoring arrangements the HPC has prepared a formal revised budgetary forecast in September (after six months) and again in December (after nine months) during the financial year.
- 3.40 Our previous review work in relation to the HPC's financial systems has indicated that these arrangements have enabled the organisation to maintain close control over its finances and to adjust its planned expenditure to respond to fluctuations that may arise in relation to budgeted costs and income.
- 3.41 We also noted that the key assumptions underpinning the work plan and budget are monitored within the Fitness to Practise Department on a monthly basis throughout the year and recorded on an excel spreadsheet so that any significant changes are highlighted, enabling action to be taken to flex the budget and work plan where necessary.
- 3.42 Based on our review we believe that these arrangements should enable the HPC to identify and address exceptional legal costs should they arise.
- 3.43 We have not therefore raised a recommendation in relation to this matter.

4 Assurance definitions

Assurance Level	Definition
Sound	Satisfactory design of internal control that addresses risk and meets best practice and is operating as intended.
Satisfactory	Satisfactory design of internal control that addresses the main risks but falls short of best practice and is operating as intended.
Satisfactory in Most Respects	Generally satisfactory design of internal control that addresses the main risks and is operating as intended but either has control weaknesses or is not operating fully in some significant respect.
Satisfactory Except For.....	Satisfactory design of internal control that addresses the main risks and is operating as intended in most respects but with a major failure in design or operation in the specified area.
Inadequate	Major flaws in design of internal control or significant non operation of controls that leaves significant exposure to risk.