

Council, 27 March 2013

Policy for the Provision of Legal Services

Executive summary and recommendations

Introduction

The attached document sets out HCPC's policy in respect of the provision of legal services. It sets out the areas where legal input is required and the approach taken in relation to the provision of legal services.

Decision

The Council is asked to review and approve the policy for the provision of legal services.

Background information

None

Resource implications

None

Financial implications

None

Appendices

Policy for the Provision of Legal Services

Date of paper

21 January 2013

Policy for the Provision of Legal Services

1 Introduction

1.1 This document sets out our policy in respect of the provision of legal services. It provides details of the areas where legal input is required, in-house capacity and the approach HCPC takes in relation to the provision of legal services

2 Areas requiring legal input

2.1 There are 16 key areas where HCPC requires legal advice. In alphabetical order they are as follows:

- **Applications for the extension of Interim Orders** - Article 31(8) of the Health and Social Work Professions Order (the Order) provides that 'the Council may apply to the court for an order made by a Practice Committee under paragraph (2) or (7) to be extended, and may apply again for further extensions
- **Article 34 – Legal Assessors** - Article 34 of the Order sets out the provisions for the appointment of legal assessors. Legal assessors attend all hearings/events organised by the adjudication team when the registrant or applicant concerned has a right to attend
- **Article 37 – Appeals against decisions of the Education and Training Committee** - The Order provides that a person can make an appeal to the Council against a decision of the Education and Training Committee in relation to a registration decision (excluding the removal of a registrant due to the non-payment of fees

Rules made under the order are in place for the purpose of regulating such appeals. They provide that an appeal can be determined on the basis of the documents alone or by the appellant attending (and or being represented) in person. At appeal hearing, the Education and Training Committee (as the respondent), is represented and its case presented.

An appeal against a decision of the appeal panel can be made to the County Court.

- **Article 38 – An appeal from an order or decision of the Health Committee or Conduct and Competence Committee other than an interim order and a decision of the Investigating Committee under article 26(7) or (12)** –The order provides for the right of a registrant to appeal a decision that their fitness to practise is impaired or that their entry to the register has been incorrectly made of fraudulently procured.
- **Article 39 - Offences** - This article sets out what are offences under the order.

The Council has a well-established prosecutions policy which sets out the HCPC's policy in such cases.

- **Commercial Law Advice** - When HCPC enter into significant commercial arrangements with other organisations, legal advice is sought on the contractual issues concerning those arrangements. Examples include: technology developments, building or refurbishment work and the purchase of land and property
- **Cross Examination in cases of a sexual nature** - The procedural rules¹ for fitness to practise proceedings provide that:

“(4) Where –

(a) the allegation against a registrant is based on facts which are sexual in nature;

(b) a witness is an alleged victim; and

(c) the registrant is acting in person;

the registrant shall only be allowed to cross-examine the witness in person with the written consent of the witness

(5) If, in the circumstances set out in paragraph (4) a witness does not provide written consent, the registrant shall, not less than seven days before the hearing, appoint a legally qualified person to cross-examine the witness on his behalf and, in default the Council shall appoint such a person on behalf of the registrant.’

In practice, where it is apparent that a registrant proposes to conduct his or her own defence, appropriate inquiries will be made of witnesses. If they indicate that they do not wish to be cross-examined by the registrant, arrangements will be made for a legal representative to be appointed

- **Employment Law** - Due to the ever increasing complexity of employment law, the HCPC require specialist HR legal advice.
- **Fitness to Practise – Public law** - Advice is sought on the sustainability of a case – this includes advice on closing cases prior to consideration by the investigating committee and on applications for discontinuance and consent
- **Fitness to Practise – Preparation and presentation** – HCPC instruct lawyers to act on its behalf when a case to answer decision has been reached by an

¹ HCPC (Investigating Committee)(Procedure) Rules 2003 (SI 2003/1574), r, 8A; HCPC (Conduct and Competence Committee)(Procedure) Rules 2003 (SI 2003/1575), r.10A; HCPC (Health Committee)(Procedure) Rules 2003 (SI 2003/1576), r.10A

investigating committee panel. Instructed legal services providers will prepare a case for final hearing – including the taking of witness statements and undertake the advocacy before a final hearing panel.

- **Information Governance – Data Protection and Freedom of Information Advice** - On occasion, legal advice will be sought on complex data protection act and freedom of information act requests to ensure HCPC is complying with its obligations under those acts.
- **Other forms of litigation – including judicial review** - When proceedings are brought by or against the Council in any court, tribunal or arbitration legal advice is sought on the conduct and defence of those proceedings.
- **Other specialist legal advice** - HCPC occasionally require specialist legal advice on a range of issues. Such advice includes pension and tax advice.
- **Parliamentary drafting** - HCPC uses the services of a parliamentary agent to enable the order and the rules to be amended in a swift and economic manner
- **Section 29 – NHS Reform and Health Care Professions Act 2002** -Under section 29 of the NHS Reform and Health Care Professions Act 2002, the Professional Standards Authority (PSA), has the power to refer a decision of HCPC's Conduct and Competence Committee and Health Committee to the High Court if it's felt that the decision was unduly lenient or under prosecuted.
- **Public Law** -HCPC uses the services of public law advisors to help it meet its obligations under the Order in a fair, transparent and equitable fashion
- **Training** - Specific training on the Order, the rules and other legislation is required to educate and keep up to date HCPC Council members, Partners and Employees on their responsibilities under the order and the relevant rules

3 Scheme of Delegation

3.1 The Scheme of Delegation sets out a number of decisions that require legal input which the Council has delegated to the Chief Executive, nominated officers of the Executive or by persons nominated by the Chief Executive. Legal advice/input is requested in those areas as appropriate.

Those areas include:

- the appointment of Legal Assessors (Chief Executive and Director of Human Resources);
- Prosecuting offences under Article 39 of the 2001 Order (Chief Executive and Director of Fitness to Practise)

- Conducting and defending all proceedings brought by or against the Council in any court, tribunal or arbitration other than proceedings relating to registration appeals or fitness to practise cases or proceedings under section 29 of the NHS Reform and Health Care Professions Act 2002 (Chief Executive)
- Determining and administering the Council's employment procedures and processes (Chief Executive and any officer nominated by the Chief Executive)
- Appointing the members of any Panel which is to conduct fitness to practise proceedings or hear a registration appeal (Director of Fitness to Practise)
- Appointing, by means of a random process, the Legal Assessor who is to be present at a fitness to practise or registration appeal hearing (Director of Fitness to Practise);
- Conducting and defending all proceedings brought by or against the Council in relation to registration appeals, fitness to practise cases and proceedings under section 29 of the NHS Reform and Health Care Professions Act 2002 (Director of Fitness to Practise)
- Seeking an extension by a court, under Article 31(8) of the 2001 Order, of an interim order made by a Practice Committee.

4 Fitness to Practise

- 4.1 A range of practice notes, policies and operating guidance are in place to support HCPC's approach in respect of fitness to practise. This helps to ensure the efficient management of resource and fairness and consistency in approach.

5 In-house legal capacity/advice

- 5.1 HCPC does not have an in-house legal team in that it does not employ those with a legal qualification as barristers or solicitors. Recruitment to posts (including to those within the FTP Case Management team) do not require a legal qualification and is done on the basis of clear competency criteria.
- 5.2 HCPC will not have an in-house legal team for the foreseeable future. Our legal services provision is managed via clear contractual and service level agreements rather than via the management of an employee and the associated costs this incurs

An in-house legal team to prepare and present fitness to practise cases will also require additional financial, environmental and human resources including building and facilities costs, management support and oversight and the likely need to create further administrative roles to support any in house legal team.

Advantages to HCPC's approach are as follows:

- The ability to disengage a poor provider of legal services through service level agreements

- That internal expertise is used as and when required – including identifying as and when legal advice needed
- Extra resources to process cases which is done on as need and as and when approach rather than the need to appoint additional employees on either a short or long term basis and the costs associated with this
- That forecasting is aided as it is the legal services providers responsibility to provide the capacity needed
- Careful and prudent resource management

5.3 Although the HCPC does not have an in – house legal team, it does have extensive in-house capacity within the Fitness to Practise department in what in other organisations is undertaken by lawyers appointed for that purpose.

HCPC case managers undertake advocacy before HCPC Fitness to Practise Committees and before registration appeal panels. Their advocacy activity includes

- Applications for interim order and reviews
- Reviews of substantive orders
- Applications for discontinuance
- Applications for consent
- FTP conviction cases
- Preliminary applications
- Registration appeals
- Vulnerable witness assessments

This enables the HCPC to:

- Reduce spend on external legal fees in specific areas
- Improve the quality, consistency and speed of the services provided by the HCPC
- Capture economies of scale
- Provide developmental opportunities through advocacy for Case Managers

6 License to instruct

6.1 In 2010, the HCPC (through Kelly Johnson, Director of Fitness to Practise and Eve Seall, Head of Case Management) were awarded a license to instruct by the Bar Standards Board. This means that instead of instructing a solicitor to instruct counsel on HCPC's behalf, we can now instruct barristers directly. This entails HCPC acting in effect as the solicitor and providing clear instruction as to the advice or work that HCPC is seeking to instruct on. The license to instruct covers a range of areas of law including presenting cases before HCPC tribunals and before the High Court.

7 Type and nature of provider(s)

7.1 Panels

7.1.1 HCPC do not use panels of legal services providers to provide it with advice in respect of fitness to practise and public law. It is important for the efficient and effective running of the HCPC that there are good and constructive relationships between it and its legal services providers and that there is consistency in the presentation and preparation of cases.

7.2 Article 38 appeals, Section 29 and Judicial Review

7.2.1 When a fitness to practise decision is challenged, HCPC do not use the legal services provider that presented and prepared the decision that is being challenged. This provides for further scrutiny of the decision and the actions taken by the initial legal services provider

7.3 Type of provider

7.3.1 Aside from niche and ad-hoc advice and for legal assessors, legal advice is provided by two categories of provider – fitness to practise presentation and preparation and a broad category of public law and other portfolio services.

7.3.2 The legal services provider that provides HCPC with its public law advice is also expected to provide a broad range of other legal advice (excluding fitness to practise presentation and preparation).

HCPC do not use the same legal services provider for the presentation and preparation of fitness to practise cases as it does for public law and other portfolio services. This is because a clear distinction is required between those who prepare and present fitness to practise cases and those who provide policy and other advice to the Council.

7.3.3 The table below sets out the type of input that is sought by the HCPC and whether it is done on an ad-hoc basis or via the appointment of a legal services provider. It also sets out the “owning” HCPC department for type of advice being sought.

Type of Legal Input	Ad – hoc/ legal services provider	Type of provider	Owning department	Comments
Applications for the extension of interim orders	Legal services provider	Public Law/Portfolio	Fitness to Practise	

Legal Assessors	n/a	n/a	Partners Fitness to Practise	Legal Assessors are appointed by a competitive recruitment exercise. They are bound by the partner code of conduct and agreement. They receive regular review sessions
Article 37 Appeals	Legal services provider	Public Law/Portfolio	Fitness to Practise	
Article 38 Appeals	Legal services provider	Public Law/Portfolio	Fitness to Practise	
Article 39 offences	Legal services provider	Public Law/Portfolio	Fitness to Practise	
Commercial Law	Legal services provider	Public/Portfolio	All	
Cross-Examination in cases of s sexual nature	Ad-hoc	n/a	Fitness to Practise	
Employment Law	Ad - hoc	Employment	Chief Executive, Human Resources	
Fitness to Practise – Public Law Advice	Legal services provider	Public Law/Portfolio	Fitness to Practise	
Fitness to Practise Preparation and Presentation	Legal services provider	Fitness to Practise	Fitness to Practise	
Information Governance	Legal services provider	Public Law/Portfolio	Secretariat	
Other forms of litigation	Ad-hoc	Dependent on the issue, challenges relating to fitness to practise	All	

		decisions – public law		
Other specialist legal advice	Ad-hoc	Dependent on the issue	All	
Parliamentary drafting	Legal services provider	Public Law/Portfolio	Chief Executive	
Public Law Advice	Legal services provider	Public law/Portfolio	All	
Section 29	Legal services provider	Public Law/Portfolio	Fitness to Practise	
Training	Legal services provider	Public Law/Portfolio	All	

8 Insurance

8.1 In order to mitigate against exceptional costs of conducting and defending proceedings brought against the Council, the HCPC has insurance arrangements in place to cover such costs