

## **The Role and Duties of the Legal Adviser**

### **Appointment of Legal Advisers**

Section 23D of the Opticians Act 1989 provides the powers to appoint legal advisers and the powers to make supplementary rules as to their functions.

Legal Advisers must have at least 5 years experience of practice and must not be members of the Council. They are to be appointed for the purpose of giving advice to the Fitness to Practise and Registration Appeals Committees on questions of law arising in connection with any matter which the Committee is considering.

### **Role and Duties**

These are derived from:

- The statutory scheme (s23D of the Act and the FTP Rules 2005)
- The case law of other healthcare regulators

### **Fitness to Practise Rules 2005**

The Rules make specific provisions in respect of the Legal Adviser which include:

- Rule 41 (general role and function)
- Rule 48 (power to question witnesses)
- Rule 39 (role in relation to vulnerable witnesses)

### **Passive Role**

Under Rule 41 the Legal Adviser must:

- Be present at all hearings
- Advise on questions referred to him/her by the Committee relating to the law, evidence and procedure
- Where requested by the Committee, advise on drafting of decisions.

### **Active Role**

Under Rule 39, any special measures that the Committee wish to adopt in order to hear evidence from a vulnerable witness are “subject to the advice of the legal adviser”.

Under Rule 41, the Legal Adviser must:

- Intervene to prevent a mistake of law being made
- Intervene to rectify irregularities in the proceedings
- Ensure that his/her advice is communicated to the parties

Under Rule 48, the Legal Adviser can ask questions of any witness, with the permission of the Chairman of the Committee.

### **Case Law**

Current case law influences how decisions of a Committee will be made and the following principles are to be derived from case law:

- The Chair of the Committee is in charge of the proceedings, not the Legal Adviser
- The Committee is the master of both the facts and the law
- The Legal Adviser is not to be likened to a judge in a criminal trial
- It is, however, incumbent on the Legal Adviser to provide advice to the Committee on all questions of law which appear to be relevant to the circumstances of each case and the relevant stage of the proceedings
- It is not incumbent on the Legal Adviser to “sum up” the facts prior to the Committee retiring to make its findings
- The Legal Adviser should not express himself/herself in a manner that creates the impression of how he/she would decide the case if they were the decision maker
- The Legal Adviser should indicate clearly that the issues are for the Committee to decide
- In some circumstances, the Legal Adviser should provide advice to the Committee on potential answers, not simply pose questions for the Committee to consider
- A misdirection in law by the Legal Adviser does not necessarily invalidate the Committee’s decision – it depends on the advice being “sufficiently significant”
- No prejudice to the registrant is caused where the Legal Adviser gives wrong advice and the Committee does not accept that advice
- The Legal Adviser can give guidance on questions of structure and presentation of the Committee’s reasons and the need where appropriate to give reasons, but not on the reasons themselves
- Whenever the Legal Adviser provides advice to the Committee otherwise than in the presence of the parties the fact that such advice has been given and its terms should be stated in the presence of the parties at an appropriate stage
- The parties are entitled to know the advice tendered by the Legal Adviser and should be given the opportunity to comment on that advice before the Committee makes its decision

- The Legal Adviser should have the opportunity to consider whether his/her advice to the Committee should be changed in the light of any submissions made by the parties

**Advice/Intervention from the Legal Adviser**

Areas most likely to require advice and/or intervention from the Legal Adviser are:

- Interim Orders (Rule 19 of the 2005 FTP Rules)
- Proof of service/proceedings in the absence of the registrant (Rule 21)
- Applications to hear the proceedings in private (Rule 23(2))
- Applications to amend the particulars of an allegation (Rule 34)
- Applications for adjournment (Rule 35)
- Admissibility of evidence (Rule 38)
- Prior to the Committee retiring to make a finding of fact (Rule 50)
- Prior to the Committee retiring to consider sanctions (Rule 54)
- Human rights issues/applications to stay the proceedings on the grounds of delay or unfairness