

## **Protocol for the commissioning of legal advice on behalf of the Colleges**

### **Background**

1. Historically, the Office of Intercollegiate Services (OIS) has commissioned legal advice on behalf of the Colleges, under the instruction of the Legal Affairs and Employment Sub-Committee. The precedent stems from broad parameters agreed in 2004 (see Annex A), which are now articulated and expanded upon here.
2. Commissioning advice through OIS has the significant benefit of it being clear up front that the legal advice is being sought by the Colleges collectively, and permitting legal privilege to extend on that basis from the outset. It is worth stressing that, in circumstances where legal privilege will be relevant, defining the "client" from the outset is important. Legal privilege cannot extend to all members of an organisation (or groups of organisations). The definition ought to identify the individuals (or at least the primary individuals) who will be seeking and obtaining legal advice.

### **Legal advice authorised by the Legal Affairs and Employment Sub-Committee**

3. The commissioning of external legal advice through OIS, on behalf of its College members, will only be undertaken if it is agreed by the Legal Affairs and Employment Sub-Committee that the resulting advice will be of benefit to most or all of the Colleges. In most cases, opinion on this will be sought (usually by circulation) through the Senior (or sole) Bursars of each College, who are normally the legal officers for their Colleges. It is recognised that there will be occasions when one of the principal intercollegiate committees concludes that, for its purposes, external legal advice would be beneficial. In all cases, however, formal authorisation of the commissioning will be made through the Legal Affairs and Employment Sub-Committee, to ensure that the advice and its wider context is appropriately managed and communicated: such authorisation may be sought by circulation should the urgency of business preclude its presentation at a meeting of the Sub-Committee.
4. Typically, the Legal Affairs and Employment Sub-Committee will seek advice on behalf of the Head of the Office of Intercollegiate Services and the Senior (or sole) Bursars of each of its member Colleges contributing to the cost of the advice. Where the initial enquiry originates from one or more of the intercollegiate committees, the members of the Colleges' Standing Committee (including the officers of the principal intercollegiate committees) will be cited in addition, or instead of, College Bursars.
5. In commissioning the advice, the Legal Affairs and Employment Sub-Committee will aim to ensure its maximum value by ensuring that the questions are posed clearly and precisely, and are posed to appropriate legal professionals (solicitor or barrister). Members of the Sub-Committee have greater levels of experience in guiding others in how best to seek and use such advice.
6. It is also worth noting that the Legal Affairs and Employment Sub-Committee and its members from time to time produce notes of guidance to the colleges on a range of legal, statutory and regulatory matters. Such notes do **not** constitute professional legal advice as might be obtained from a solicitor or Counsel with a current practicing certificate and appropriate professional indemnity insurance, and Colleges are reminded that, in cases of question or doubt, they should seek their own formal legal advice. The members of the Legal Affairs and Employment Sub-Committee cannot provide legal advice and do not have relevant professional indemnity insurance for that purpose. They are, however likely to have experience relevant to the question of whether legal advice should be commissioned, and if so, from whom, and of giving instructions in terms likely to ensure the advice is helpful and value for money.

## The agreed procedure for seeking external legal advice on behalf of the Colleges

7. The decision on whether or not to take legal advice on behalf of all the Colleges has been delegated by the Colleges to the Legal Affairs and Employment Sub-Committee (LA&E). The Bursars' Committee sets an annual budget for legal advice (£7,500 in 2018-19). Approximate costs of legal advice are provided as Annex B.
8. Requests for the commission of external legal advice should be sent to either the Chair or Secretary of the LA&E. The following process shall be followed:
  - a) Any request for legal advice is initially considered by the Chair of LA&E, who may wish to seek further clarification on any of the following:
    - i) the nature of the legal advice sought, and the underlying causes of concern (including, if relevant, any record of prior discussions on the issue) ;<sup>1</sup>
    - ii) why the matter is of wider interest to all (or the majority of) the Colleges;
    - iii) the urgency of the request (i.e. whether there are any particular deadlines to be working to).
  - b) The Chair of LA&E (or the Secretary at the request of the Chair) will prepare a summary of the request for the full LA&E<sup>2</sup> to consider (at a scheduled meeting or by circulation). In doing so, the Chair will provide an indication of the nature of the external legal advice to be sought and by whom (e.g. solicitor or barrister) and, if possible, a likely indication of costs. Where the matter is urgent, the Chair may consult with the Secretary of the Bursars' Committee, who between them may make a decision on behalf of LA&E, providing it is reported as soon as possible.
  - c) The decision shall include an assessment of whether the legal advice is likely to be relevant to all or the majority of Colleges, and whether the legal advice to be sought may be of interest or relevance to related third parties (most likely, the University or the Oxford Colleges).
  - d) If the decision is taken to commission legal advice **and** it is felt to be relevant to all or the majority of Colleges (but not to related third parties), the Secretary of the LA&E will:
    - i) inform all members of LA&E and all Senior (or sole) Bursars of the general nature of the advice to be sought and, where appropriate, the officers of relevant intercollegiate committees, inviting comment which may expand or limit the advice to be sought (either through prior knowledge, previous legal advice received or additional points for clarification or elucidation);

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<sup>1</sup> Where the request for legal advice arises from a principal intercollegiate committee, copies of the relevant minutes of meetings where the underlying concerns were discussed, as well as informal commentary on those discussions, may be sought from the officers of the relevant intercollegiate committee.

<sup>2</sup> For clarity, at the outset, the matter will be determined to be either reserved or unreserved business of LA&E by the Chair. Unreserved business will be circulated to all members of the Committee, as well as the University's legal representative attendee to the Committee.

- ii) work with one or more members of LA&E to: draft appropriate instructions, consulting further (to (a) above) if necessary with the original requester to clarify the issues on which advice is to be sought and calling upon expert advice within collegiate Cambridge as appropriate; and determine whether the client needs to be defined to protect legal privilege;
  - iii) confirm the written instructions with the Chair of LA&E, who shall advise on the most suitable person to seek legal advice from;
  - iv) commission the legal advice;
  - v) on receipt of any written advice, post it in the secure area of the Bursars' website and notify all Colleges and, if appropriate, circulate it to the officers of the relevant intercollegiate committees (with instructions if necessary on restrictions of distribution).
- e) If the decision is taken to commission legal advice on behalf of the Colleges **and** it is felt to be relevant to all or the majority of Colleges (**and** it is felt to be relevant to related third parties), the Secretary of the LA&E will adhere to the procedure in 5d above, save that the Secretary will confirm relevant points of contact at the third party, and include them in the communications at points i), iii) and v) in that process.
- f) If the decision is taken to commission legal advice on behalf of the Colleges but it is **not** felt to be relevant to all or the majority of Colleges, the Secretary of the LA&E will:
- i) inform all Senior (or sole) Bursars of the general nature of the advice to be sought and inviting comment which may expand or limit the advice to be sought (either through prior knowledge, previous legal advice received or additional points for clarification or elucidation);
  - ii) indicate clearly that the legal advice will be commissioned on a strict cost-sharing basis between Colleges that confirm in writing they wish to receive the resulting advice. (The advice will not be shared with Colleges who opt out.)
  - iii) work with one or more members of LA&E to draft appropriate instructions, consulting further (to (a) above) if necessary with the original requester to clarify the issues on which advice is to be sought, and calling upon expert advice within collegiate Cambridge as appropriate and consulting with all opted-in Colleges.
  - iv) confirm the written instructions with the Chair of LA&E, who shall advise on the most suitable person to seek legal advice from.
  - v) commission the legal advice.
  - vi) on receipt of the advice, post it in the secure area of the Bursars' website and notify all opted-in Colleges (with instructions if necessary on restrictions of distribution).
- g) If the decision is taken **not** to commission legal advice on behalf of the Colleges, the Secretary of the LA&E will notify the original requester of the decision, given reasons where appropriate (e.g. not relevant to sufficient numbers of Colleges; does not represent good value for money in relation to the identified risks), noting that the decision does not preclude them from seeking buy-in from individual Colleges in order to share the costs of any legal advice they may choose to proceed with.

## **Retrospective claims by individual Colleges for cost-sharing of already-received legal advice**

9. Historically, there has been a strong precedent for Colleges generously sharing legal advice they have obtained on a specific or general issue, where they have subsequently felt that this would be useful information to share more widely amongst colleagues. Providing the advice does not relate too closely to a specific case, such sharing of knowledge and good practice ends up benefiting all Colleges.
10. The procedure outlined above is not in any way meant to curtail or preclude that generosity, but where a College has sought legal advice and, after the event, feels that there is merit in the legal advice being shared amongst the College, it may wish retrospectively to seek to share the costs. Any such request should be sent to either the Chair or Secretary of the LA&E, where the procedures outlined in Section 6 above will be adapted as appropriate in coming to a decision.
11. Where advice is taken by one College independently, and then retrospectively considered for wider circulation, care must be taken by the College on the waiving of legal privilege that may result from that action.

Dr M Russell  
20 September 2018

## **Annex A: Minutes of the Legal Affairs and Employment Sub-Committee, 29 July 2004**

*The following minute is the record that articulates the intentions of the Bursars' Committee for the commissioning of legal advice on behalf of the Colleges, and has been used to direct the current protocol.*

### Solicitors' charges

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The Sub-Committee further agreed at their last meeting

- to consider whether specific items of work (such as the preparation of model residential letting agreements, or of a model staff employment contract and handbook) might be put out for tender by the Sub-Committee on behalf of the Colleges collectively, to be funded jointly by the Colleges; and
- to consider what protocol or guidelines might be proposed in the situation where a College obtains legal advice on an issue of potentially general importance to the Colleges generally, and the question arises whether other Colleges individually might contribute if they wish access to the work or whether the Bursars' Committee might collectively take over and circulate the work and pay for it.

After discussion, the Sub-Committee agreed

- (i) that they would consider from time to time whether there are specific matters of general concern to the Colleges on which legal work ought to be commissioned, Bursars being notified of each such decision and of an estimated time for completion of the work;
- (ii) any Bursar considering commissioning for his or her College legal work in relation to a matter which might be of general interest to the Colleges might raise the matter with the Sub-Committee, through the Chairman, with a view to the work being undertaken on a joint basis and at shared expense;
- (iii) any Bursar who has already obtained such work for his or her College might raise the matter with the Sub-Committee with a view to the cost being met by the Colleges collectively; and
- (iv) in such a situation where the Sub-Committee do not agree to the cost being met by the Colleges collectively, the Bursar concerned may advertise to Bursars, directly or through the Sub-Committee, the availability of the work on a cost-sharing basis.
- (v) It will of course remain the case that any Bursar might circulate, through the Sub-Committee or otherwise, on a gratuitous basis any legal work or opinion obtained by his or her College considered to be of general interest to the Colleges.

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**Annex B: Examples of costs of legal advice recently commissioned on behalf of the Colleges**

Senior Counsel opinion (several meeting and written Opinion)	(Fol judicial review)	£15,000
Senior Counsel opinion (1 hr meeting and written Opinion)	(GDPR; trust funds)	£10,000
Counsel opinion (production of model policy)	(retirement)	£10,000
Counsel opinion (written Opinion)	(discrimination)	£5,000
Solicitor – production of standard contracts	(May Balls)	£5,000
Solicitor – verbal advice on casework	(student admissions)	£1,000
Solicitor – written appeal casework	(student council tax)	£300