

Council – 11 February 2010

Prosecutions Policy

Executive summary and recommendations

Introduction

The responsibility for the regulation of Hearing Aid Dispensers is due to become the responsibility of the HPC on 1 April 2010. Article 39A(1) of the Health Professions (Hearing Aid Dispensers) Order 2009, provides that 'Subject to paragraph (2), a person who is not a registered hearing aid dispenser must not perform the functions of a dispenser of hearing aids and 39A(3) provides that 'any person who contravenes paragraph (1) is liable of summary conviction to a fine of an amount not exceeding level 5 on the standard scale.

To ensure that the Council's prosecution policy properly reflects the provision of Article 39A the Executive has undertaken a review of the policy to ensure it remains fit for purpose. Changes to the policy are marked through or underlined. If approved, the policy will come into force on 1 April 2010

Decision

The Council asked to agree the attached changes to the Council's Prosecutions Policy

Background information

The Council agreed an updated version of the Prosecutions Policy in October 2007. The Executive will ensure that any operating guidance reflects the provisions of the policy attached.

Resource implications

Case Team 3 sits within the Fitness to Practise directorate's case management department and comprises of 4 case managers led by a lead case manager. That team is responsible for the investigation of title and function offences under Article 39 of the Order, the management of health and character cases, the management of registration appeal cases and the management and investigation of conviction FTP cases. The headcount for 2010-2011 takes into account an increase in the number of cases that these team will manage.

Financial implications

Accounted for in 2010-2011 draft budget

Appendices

Revised Prosecution Policy

Date of paper

25 February 2010

Prosecution Policy

Introduction

Articles 39 and 39A of the Health Professions Order 2001 (the Order) create criminal offences relating to the protection of titles and function, fraudulent register entries and non-compliance with orders and directions made during the fitness to practise process.

The Council has authorised the Chief Executive and the Director of Fitness to Practise to oversee the investigation and prosecution of offences under those Articles, have delegated responsibility for the prosecution of offences under those Articles, 39 of the Health Professions Order 2001 (“the 2001 Order”) but subject to this prosecution policy established by the Council.

HPC’s remit as a regulator extends ~~regulates~~ health professionals throughout the United Kingdom, but England and Wales, Scotland and Northern Ireland ~~have~~ are three separate and distinct legal jurisdictions, each of which has its own, distinct, criminal justice system. It is of critical importance that ~~all those involved in the~~ who investigate ~~and prosecute~~ of offences under the Order on behalf of the HPC are cognisant of the differences between those systems and are able to investigate and prepare cases in accordance with the laws and procedures which apply in each jurisdiction.

As offences under Articles 39 and 39A of the Order are a matter of general criminal law, the HPC does not have exclusive control over the investigation and prosecution of such offences. Consequently, this policy only applies to prosecution decisions taken by the HPC. It is not and cannot constitute guidance of general application and does not affect decisions in relation to offences under the Order taken by other law enforcement agencies or prosecuting authorities.

Offences under Article 39 and 39A

Article 39(1) of the Order creates three types of “protection of title” offence:

- falsely representing that a person is on the HPC the register;
- misusing a title protected by the Order;
- falsely representing to possess a qualification in a relevant profession

Article 39(3) extends liability for such protection of title offences to a person who makes representations on behalf of someone else and to a person who permits someone else to do so on his or her behalf.

Article 39(4) of the Order provides for separate offences relating to fraudulent register entries.

Article 39(5) deals with non-compliance in respect of fitness to practise proceedings and makes it an offence to fail to comply with:

- an Order made by an HPC Panel to produce documents or attend a hearing; and
- a requirement to provide information made by an HPC Investigator (i.e. an “authorised person” under Article 25(1) of the Order).

Article 39A(1) makes it an offence for person who is not a registered hearing aid dispenser to perform the functions of a dispenser of hearing aids.¹

Schedule 3 to the Order defines the functions of a dispenser of hearing aids as:

- assessing or testing an individual’s hearing; or
- prescribing a hearing aid for an individual,

with a view to the supply, whether by the person performing those functions or another, of a hearing aid to, or for the use of, that individual by way of retail sale or hire.

Policy: ~~Protection of title and function offences~~

To ensure that the available resources are used to their best effect in protecting the public, HPC’s enforcement activities in relation to the protection of title and function should be directed at detering offenders ~~preventing misuse of titles~~ and encouraging ongoing compliance with the law rather than on isolated prosecution.

However, throughout the enforcement process it must be made clear that HPC will not hesitate to prosecute (or in Scotland, recommend prosecution²) where it is appropriate to do so.

Normally, the process adopted by HPC is as follows:

- all necessary steps should be taken to secure ongoing compliance with the relevant provisions of the Order;
- in the first instance, suspected offenders should be given 14 days in which to explain any alleged offence, but subject to a warning that they may be prosecuted without further notice if they fail to respond in that time;
- where it is established that conduct which may be an offence has taken place, the person concerned should be served with a ‘cease and desist’ notice and required to confirm, within 14 days of the notice being served, that the offending conduct has ceased and, where appropriate, to give an

¹ subject to limited exceptions for trainee dispensers on HPC approved programmes and certain specialist medical practitioners

² In Scotland, enforcement agencies cannot prosecute on their own behalf but must refer cases to the Crown Office and Procurator Fiscal Service. Therefore, in relation to Scotland, any references in this document to HPC prosecuting an offender should be read as references to HPC presenting a prosecution report to the Procurator Fiscal.

undertaking that it will not be repeated. Again, subject to a warning that they may be prosecuted without further notice if they fail to respond in that time;

- if those steps fail to secure ongoing compliance, action should then be taken to gather evidence with a view to prosecuting the alleged offender, including (where relevant):
 - obtaining witness statements from complainants;
 - collecting physical evidence such as copies of advertising materials, etc.;
 - photographing premises; and
 - interviewing the alleged offender.

Once the evidence-gathering phase has concluded, a decision on prosecution must be taken by the Chief Executive or the Director of Fitness to Practise, based upon the test set out in this policy and subject to obtaining the advice of one of HPC's lawyers (but not one who has been involved in the investigation of the alleged offence).

The decision reached should be recorded in writing, together with the reasons for that decision.

Where it is decided that prosecution is appropriate, formal authority should be given to the Case Manager to commence criminal proceedings or, in Scotland, report the offence to the Procurator Fiscal.

Article 39A Offences: Unlawful delegation

In relation to offences under Article 39A, it is important to note that the functions of a hearing aid dispenser cannot be lawfully delegated to an unregistered person. Only a registered dispenser may perform the functions of assessing or testing hearing or prescribing a hearing aid with a view to such a device being supplied by way of retail sale or hire.

A dispenser may ask another person to assist in the performance of those functions, but only under appropriate supervision by the dispenser. The line between assistance and delegation is a fine one and ultimately is a question for the courts. However, in determining whether unlawful delegation has taken place, the HPC will look at the nature and scope of the acts that the unregistered person has been asked to undertake and the nature, extent and proximity of the supervision by the dispenser. As a general starting point, supervision will not be regarded as adequate if the dispenser and the unregistered person are not on the same premises.

Although Article 39A only applies to a person who unlawfully performs the functions of a dispenser, a person who asks an unregistered person to perform the functions of a dispenser, (including a dispenser who unlawfully delegates such functions) is liable to be prosecuted for aiding and abetting the offence³.

³ In England & Wales, under section 44(1) Magistrates Courts Act 1980 and, in Northern Ireland, under Article 59 Magistrates' Courts (Northern Ireland) Order 1981. In Scotland, the corresponding offence is art and part liability.

Where evidence exists to show that a dispenser has unlawfully delegated functions, HPC will consider prosecuting both the person who unlawfully performed the controlled act and the dispenser who aided and abetted that an offence.

Policy: Other offences

Fraudulent entry and non-compliance offences under Articles 39(4) and Article 39(5) are generally intertwined with HPC's fitness to practise process and need to be dealt with on a case by case basis. Decisions to prosecute in such cases must be made in a manner which makes effective use of available resources, promotes public protection and maintains confidence in the regulatory process.

The decision to prosecute

In order to prosecute a person for an offence under the Order, HPC must be satisfied that there is sufficient admissible, substantial and reliable evidence to provide a realistic prospect of conviction.

In deciding whether to prosecute in respect of any offence HPC will:

- act in the interests of justice and not solely for the purpose of obtaining a conviction;
- act in accordance with the Human Rights Act 1998;
- ensure that the law is properly applied, that all relevant evidence is put before the court and that disclosure obligations are met;
- be fair, independent and objective, not letting any views about ethnic or national origin, sex, religious beliefs, political views or sexual orientation influence decisions and not be affected by improper or undue pressure from any source; and
- act on the basis of the established evidential test and public interest test, (which are broadly similar in each UK jurisdiction) as set out in the relevant code.

For this purpose, the "relevant code" means:

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| in England & Wales: | the <i>Code for Crown Prosecutors</i> issued by the Crown Prosecution Service; |
| in Scotland: | the <i>Prosecution Code</i> issued by the Crown Office and Procurator Fiscal Service; and |
| in Northern Ireland: | the <i>Code for Prosecutors</i> issued by the Public Prosecution Service Northern Ireland. |

The evidential test

A prosecutor must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against a defendant on each charge, taking

account of what the defence case may be and how that is likely to affect the prosecution case.

A realistic prospect of conviction is an objective test. It means that a court, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the “standard of proof” that the courts themselves must apply.

In deciding whether there is enough evidence to prosecute, those acting on HPC’s behalf must consider whether the evidence can be used and is reliable. In many cases the evidence will not give any cause for concern but, in cases in which the evidence may not be as strong as it first appeared, the following need to be considered:

is the evidence admissible?

Can the evidence be used in court or is it likely to be excluded, for example, because of the way in which it was gathered? If so, is there enough other evidence for a realistic prospect of conviction?

is the evidence reliable?

Is there evidence which might support or detract from the reliability of other evidence? What explanation has the defendant given and is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation? Are any witnesses likely to weaken the prosecution case, for example, because of any motive that may affect his or her attitude to the case? Are there concerns over the accuracy or credibility of a witness?

The public interest test

In 1951, Lord Shawcross, the Attorney General, said of the public interest:

“It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution”.

In each case where there is enough evidence to provide a realistic prospect of conviction, the public interest in prosecuting must also be considered.

As HPC’s role is to protect the public, prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favour.

Even when there are public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. Those factors include:

- the court is likely to impose a nominal penalty;

- the defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence, unless the nature of the particular offence requires a prosecution;
- the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
- a prosecution is likely to have a bad effect on the defendant's physical or mental health;
- the defendant has put right the loss or harm that was caused.

April 2010

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