

**Agenda Item 7**

**Enclosure 5**

**Health and Care Professions Council  
22 September 2016**

**Prosecution Policy**

**For discussion and approval**

**From Sarita Wilson, Head of Case Reception  
and Triage**

Council, 22 September 2016

Fitness to Practise – Revisions to the Prosecution Policy

Executive summary and recommendations

### **Introduction**

Policies and Practice Notes are regularly reviewed to ensure they remain fit for purpose and reflect changes in case law and regulatory practice.

The Prosecution Policy sets out the HCPC's enforcement approach in relation to offences under Article 39 of the Order.

The Policy was last considered by Council in 2012. These revisions arise from a recent review of the process; the changing nature of the matters we receive; and feedback from those involved in the process.

The key revisions to the document are:

- changes to some of the language used so the policy is more accessible to HCPC employees, members of the public and other stakeholders;
- further detail about what is meant by intent to deceive (page 2);
- further detail about when an offence will not be committed (page 2-3);
- further detail about hearing aid dispensing offences (page 5);
- further detail about fraudulent entry and non-compliance offences and that both are generally intertwined with the fitness to practise process so can often be addressed through those processes (page 6);
- a new section on the enforcement process which includes reference to instructing inquiry agents and/or liaison with the police or trading standards (page 6-8); and
- further detail about the decision to prosecute (page 8).

### **Decision**

The Council is asked to approve the revised Prosecution Policy.

### **Background information**

There is no additional background information.

### **Resource implications**

There are no additional resource implications as a result of this paper.

**Financial implications**

There are no additional financial implications as a result of this paper.

**Appendices**

Appendix 1 Prosecution Policy

**Date of paper**

7 September 2016

## Prosecution Policy

### Introduction

Articles 39 and 39A of the Health and Social Work Professions Order 2001 (the **Order**) create criminal offences relating to:

- the protection misuse of the designated titles which are protected under the Order<sup>1</sup> and the making of false claims relating to being HCPC-registered or qualified in a relevant profession;
- the controlled act of hearing aid dispensing; function,
- procuring fraudulent register entries in the HCPC register; and
- non-compliance with orders and directions made during the fitness to practise and registration appeals processes.

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, but subject to this prosecution policy.

The HCPC's remit as a regulator extends throughout the United Kingdom<sup>2</sup>, but England and Wales, Scotland and Northern Ireland are separate legal jurisdictions, each of which has its own, distinct, criminal justice system. It is of critical importance that those who investigate and prosecute offences under the Order on behalf of the HCPC ~~are cognisant of~~ understand the differences between those systems and are able to investigate and prepare cases in accordance with the applicable laws and procedures in each jurisdiction.

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

### ~~Offences under Article 39 and 39A~~ Protection of title offences

Article 39(1) of the Order creates three types of offences broadly related to the 'protection of title'. That Article makes it an offence for a person, with intent to deceive (whether expressly or by implication) to:

<sup>1</sup> those titles are set out in the Health Professions (Parts of and Entries in the Register) Order of Council 2003 (as amended) and are reproduced in the Annex.

<sup>2</sup> apart from the regulation of Social Workers, where the HCPC's remit is limited to England

- falsely representing that a person is **to be** on the HCPC register<sup>3</sup>;
- misusing **use** a **designated** title protected by the Order **to which the person is not entitled**<sup>4</sup>;
- falsely representing to possess **hold** a qualification in a relevant profession.

Article 39(3) extends liability for **those** such protection of title offences **to a person who (also with intent to deceive)** to:

- a person who makes **false** representations on behalf of **about** someone else; **or**
- and to a person who permits someone else to **make false representations** do so on his or her behalf.

**An offence must be committed with an “intent to deceive” and may be committed either expressly (for example, by means of a false claim made directly to a particular person) or by implication (for example, by advertising or displaying material which suggests to a wider audience that a person is a member of a relevant profession).**

**The purpose of these offences is to protect the public, who are entitled to assume that a person who, for example, uses the designated title “physiotherapist” or offers to provide “physiotherapy” is a qualified physiotherapist who is registered with the HCPC.**

**As the designated titles may only be used by HCPC registrants, an offence may be committed even if a person holds a qualification in or related to a relevant profession and regardless of whether that qualification makes the person eligible to apply for HCPC registration.**

**Intent relates to the consequences that a person wants to arise or knows are likely to arise as a result of his or her actions. To establish an “intent to deceive”, the HCPC must be able to prove<sup>5</sup> that the offender was seeking to lead others to believe that they are or would be dealing with an appropriately qualified HCPC registrant.**

**An offence will not be committed where a designated title (or related expression) is used:**

- **in circumstances where it cannot be misconstrued, for example:**
  - **in conjunction with a suitable prefix which makes clear that the user is not claiming to be a registrant, such as “student paramedic”. However, the title used must be unambiguous.**

<sup>3</sup> including being on a particular Part of the register or having a particular annotation or other entry in the register.

<sup>4</sup> under Article 39(1A) of the Order, a social worker who is registered by the Care Council for Wales, the Scottish Social Services Council or the Northern Ireland Social Care Council does not commit an offence by using the title “social worker” in England. However, Article 13B of the Order provides that a social worker who is only registered in another UK country may only practise in England on a temporary basis.

<sup>5</sup> to the criminal standard of proof, of beyond reasonable doubt

When used by an unregistered person, “occupational therapy assistant” is unambiguous, “assistant occupational therapist” is not;

- by a person who is no longer on the HCPC register but who is clearly not claiming to be so, such as a journal article in which the author is described as a “retired biomedical scientist”; or
- as part of a title which makes clear that no claim to treat humans is being made, such as “weld inspection radiographer” or “equine physiotherapist”<sup>6</sup>;
- in the name of a company or business which provides services to a relevant profession, such as a name which includes the phrase “chiropractic supplies”. However, Companies House will require the HCPC to provide a ‘letter of non-objection’ when a person first uses a company or business name of that kind;
- by a course provider offering education and training which is related to a relevant profession,

The HCPC recognises that courses are sometimes advertised in a misleading manner, for example, implying that the course will lead to eligibility for HCPC registration when that is not so. In cases of that kind, the HCPC will take appropriate action, such as making contact with the provider or referring the case to the local trading standards service, but will rarely be able to pursue the matter as an offence under the Order.

~~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 HCPC Panel to produce documents or attend a hearing; and~~
- ~~• a requirement to provide information made by an HCPC 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.~~

~~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.~~

---

<sup>6</sup> Article 2 of the Veterinary Surgery (Exemptions) Order 2015 permits any adult to provide animal physiotherapy which has been prescribed by a registered veterinary surgeon.

## **Policy: title and function offences**

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

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

Normally, the process adopted by the HCPC 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 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 the HCPC'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.

**Hearing aid dispensing offences 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.<sup>7</sup>**

**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.**

**The offence only relates to dispensing activities which are connected with the retail sale or hire of hearing aids. It does not affect hearing testing or dispensing performed, for example, by audiologists who work for the National Health Service.**

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 **hearing aid** 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. **It is important to note that those functions cannot lawfully be delegated to an unregistered person.**

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 HCPC 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 offence.<sup>8</sup>

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

---

<sup>7</sup> subject to limited exceptions for trainee dispensers on HCPC approved programmes and certain specialist medical practitioners

<sup>8</sup> 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.



**Policy: ~~Other~~ Fraudulent entry and 'non-compliance' offences**

**Article 39(4) of the Order makes it an offence for a person to fraudulently procure, or try to procure, the making, amendment, removal or restoration of an entry in the HCPC register.**

**Article 39(5) of the Order makes it an offence for a person, without reasonable excuse, to fail to comply with any requirement imposed by:**

- **an order made by an HCPC Panel to produce documents or attend a hearing; or**
- **a requirement to provide information made by an HCPC Investigator (i.e. an 'authorised person' under Article 25(1) or 37(7) of the Order).**

Fraudulent entry and non-compliance offences under Articles 39(4) and Article 39(5) are generally intertwined with the HCPC's fitness to practise process and **can often be addressed within those processes. Fraudulent entry can be pursued as an allegation under Part V of the Order and a registrant's failure to comply with an order or requirement made in the course of fitness to practise proceedings can often be dealt with appropriately as part of those proceedings.** ~~need to be dealt with on a case by case basis.~~

Decisions to prosecute in such cases **need to be dealt with on a case by case basis and** must be made in a manner which makes effective use of available resources, promotes public protection and maintains confidence in the regulatory process.

### **Enforcement**

**To ensure that the available resources are used to their best effect in protecting the public, the HCPC's enforcement activities in relation to offences under the Order should be risk-based and directed at encouraging ongoing compliance with the law and deterring offenders, rather than on isolated prosecution.**

**As the HCPC may prosecute (or in Scotland, recommend prosecution)<sup>9</sup> in any case where it is appropriate to do so, all investigations must be conducted in accordance with the Criminal Procedure and Investigations Act 1996, which requires:**

- **all reasonable lines of enquiry to be pursued, whether these point towards or away from the suspected offender;**
- **all relevant information to be recorded and all relevant material to be retained;**
- **disclosure to the defence of all material that does not form part of the HCPC's case but might reasonably assist the case for the**

---

<sup>9</sup> 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 the HCPC prosecuting an offender should be read as references to the HCPC presenting a prosecution report to the Procurator Fiscal.

## defence.

The scope and nature of any investigation into an offence under the Order will need to be determined on a case by case basis and will largely depend upon the nature of the alleged offence and information available or provided by any complainant at the outset of that investigation.

In respect of protection of title offences, the focus of enforcement activity should be to secure ongoing compliance with the law rather than the pursuit of isolated prosecutions. In many cases, the first and often only step that will need to be taken is to make a person aware of the relevant legislation and what they need to do in order to comply with it. Those who act on the HCPC's behalf need to recognise that education is an important aspect of the enforcement process.

Generally, the first step in the enforcement process should be to inform the person concerned that the HCPC has been made aware of a potential offence, to explain the relevant legislation and to provide the person concerned with a reasonable opportunity to provide their side of the story.

Complaints of an offence are usually well-intentioned but nonetheless may be incorrect. This may arise where, for example, a registrant has changed their name on the register following marriage but continues to practise under their former name. In cases of that kind, it is totally inappropriate for the first communication which that registrant receives from the HCPC to be an aggressive threat of prosecution.

Where an unsatisfactory response is received to initial correspondence or that correspondence is ignored, further correspondence should be sent which includes a warning that the person concerned is at risk of prosecution and either:

- provides the person with a further opportunity to explain the alleged offence; or
- takes the form of a 'cease and desist' notice which requires the person to confirm that the offending conduct has ceased and will not be repeated.

If those steps fail to secure compliance, action should then be taken to gather detailed evidence with a view to either referring the matter to another agency or prosecuting the alleged offender. At this stage of the process, the evidence gathering may include taking witness statements, collecting physical evidence (such as advertising materials) or instructing inquiry agents to conduct field investigations.

Liaison with the police or trading standards may take place at this stage of the enforcement process and, in the course of that liaison, it may become apparent that a local investigation is already being conducted. In that event, it may be more appropriate for the HCPC to refer the matter to that local agency. In particular, the police can issue warnings and cautions as

**an alternative to prosecution, which may be the more appropriate means of disposal for some cases.**

**Once the evidence-gathering phase has concluded, any decision to prosecute must be taken by the Chief Executive or the Director of Fitness to Practise, based upon this policy and subject to obtaining the advice of the HCPC's legal counsel.**

**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 person responsible for the case to commence criminal proceedings or, in Scotland, report the offence to the Procurator Fiscal.**

### **The decision to prosecute**

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

**Prosecution punishes wrongdoing, deters repetition and acts as a warning to others.** In deciding whether to prosecute in respect of any offence, the HCPC will **adopt a risk-based approach, considering each case on its particular facts and:**

- 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:

in England & Wales: the *Code for Crown Prosecutors* issued by the Crown Prosecution Service;

in Scotland: the *Prosecution Code* issued by the Crown Office and Procurator Fiscal Service; and

in Northern Ireland: the *Code for Prosecutors* 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 the HCPC’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? Is any witness 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 then 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 the HCPC’s role is to protect the public, prosecution will usually take place in **cases where alternatives to prosecution have failed to secure compliance or are inappropriate**, unless there are **other** public interest factors against prosecution which clearly outweigh those in favour of doing so.

Even when there are public interest factors against prosecution in a particular case, often **it may still be appropriate to prosecute** the prosecution should go ahead and **for** those factors **should to** 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 an adverse effect on the defendant's physical or mental health;
- the defendant has put right the loss or harm that was caused.

**ANNEX**  
**Designated Titles**

<b>Profession</b>	<b>Title(s)</b>
Arts Therapists: Music, Drama or Art	Art Therapist Art Psychotherapist Dramatherapist Music Therapist
Biomedical Scientists	Biomedical Scientist
Chiropodists and Podiatrists	Chiropodist Podiatrist
Clinical Scientists	Clinical Scientist
Dietitians	Dietitian Detician
Hearing Aid Dispensers	Hearing Aid Dispenser
Occupational Therapists	Occupational Therapist
Operating Department Practitioners	Operating Department Practitioner
Orthoptists	Orthoptist
Paramedics	Paramedic
Physiotherapists	Physiotherapist Physical Therapist
Practitioner Psychologists	Practitioner psychologist Registered psychologist Clinical psychologist Counselling psychologist Educational psychologist Forensic psychologist Health psychologist Occupational psychologist Sport and exercise psychologist
Prosthetists and Orthotists	Prosthetist and Orthotist Prosthetist Orthotist
Radiographers: Diagnostic or Therapeutic	Radiographer Diagnostic Radiographer Therapeutic Radiographer
Social Workers in England	Social Worker
Speech and Language Therapists	Speech and Language Therapist Speech Therapist