

Health Professions Council: 3 October 2007

Prosecutions Policy

Executive summary and recommendations

**Introduction**

The Council approved its prosecutions policy in March 2005. The Executive has recently reviewed that policy and an updated version is attached.

**Decision**

The Council is asked to approve the attached prosecutions policy.

**Background information**

See management reports for numbers of complaints about misuse of title.

**Resource implications**

2 Case Officers within the Fitness to Practise team manage complaints about misuse of title

**Financial implications**

None

**Appendices**

Prosecutions Policy

**Date of paper**

14<sup>th</sup> September 2007

## **Prosecution Policy**

### **Introduction**

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

HPC regulates health professionals throughout the United Kingdom, but there are three separate and distinct criminal justice systems in England and Wales, Scotland and Northern Ireland. It is of critical importance that all those involved in the investigation and prosecution of offences under the 2001 Order 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.

### **Offences under the 2001 Order**

Article 39(1) of the 2001 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 2001 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 2001 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 requirements to provide information made by an HPC Investigator (i.e. an “authorised person” under Article 25(1) of the 2001 Order).

### **Policy: Protection of title 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 should

be directed at 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 (in Scotland, recommend prosecution<sup>1</sup>) where it is appropriate to do so.

Normally, the process adopted by HPC should be as follows:

- all necessary steps should be taken to secure ongoing compliance with the relevant provisions of the 2001 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;
- physical evidence such as copies of advertising leaflets and brochures, etc.;
- photographing premises; and
- interviewing the alleged offender.

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<sup>1</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 HPC prosecuting an offender should be read as references to HPC presenting a prosecution report to the relevant Procurator Fiscal.

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 who has not advised upon, or 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.

## **Policy: Other offences**

In respect of fraudulent entry and non-compliance offences under Articles 39(4) and Article 39(5), these are 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 on the basis 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 2001 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:

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 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.