

PROTOCOL FOR CRIMINAL PROSECUTIONS

This protocol governs the conduct of investigations and the decision on whether to prosecute suspected criminal offences under the Opticians Act 1989, as amended by the Opticians Act 1989 (Amendment) Order 2005 and related legislation ("the Act").

The Overriding Objective

The overriding objective of the General Optical Council ("the GOC") in conducting a criminal investigation or bringing a criminal prosecution is to protect, promote and maintain the health and safety of the public.

Background

Qualifying as an optician, whether as an optometrist or as a dispensing optician, demands a long period of study and practical training. The GOC imposes high standards of education, conduct and performance on the opticians registered with it, and the Act has restricted certain activities, and the use of certain titles, to GOC registrants. The Act protects the public from unregistered persons who are not bound by the GOC's standards, as well as from dishonest individuals who mislead people as to their registration status.

The Council for Healthcare Regulatory Excellence stated in its report 'Protecting the Public from Unregistered Practitioners', published February 2010, that "*Patients and the public recognise health professional titles because they indicate competence and fitness to practise. There is a risk to patient safety and public protection when unqualified people pass themselves off as registered professionals. Health professional regulators have a duty to ensure protection for patients and the public, and tackling title misuse is an important part of this.*"

Statutory Framework

The Act creates criminal offences in relation to (a) Activities that are restricted to persons registered with the GOC or the General Medical Council and (b) Titles that are restricted to persons registered or enrolled with the GOC.

The offences created by the Act are as follows:-

- i. Carrying out a sight test when not a registered optometrist or medical practitioner (an offence under Section 24);
- ii. Fitting contact lenses when not a registered optometrist, dispensing optician or medical practitioner (an offence under Section 25);
- iii. Selling optical appliances (with specific exceptions) or zero powered contact lenses otherwise than under the supervision of a registered optometrist, dispensing optician or medical practitioner (an offence under Section 27);
- iv. Pretending to be a registered optometrist or dispensing optician, or an enrolled optical business, when not entitled (an offence under Section 28).

The GOC does not have statutory prosecution powers, and considers allegations of suspected offences as part of its remit to protect, promote and maintain the health and safety of the public. In addition to offences created by the Act, the GOC may consider other allegations that are relevant to its remit, for example that someone has obtained registration by providing false information or that someone has breached a court order requiring the production of a document requested by the GOC in the course of an enquiry. When considering such allegations, the GOC will endeavour to follow this protocol, with modifications as necessary.

Procedure

The GOC may receive allegations verbally or in writing, and may receive anonymous allegations.

The Registrar must at all stages consider whether to refer the matter for a fitness to practise investigation or to consult or notify another agency in relation to the matter, including external legal advisers, another regulator or the police.

Stage 1: Initial screening

The Registrar (or a person nominated on behalf of the Registrar) must first ascertain whether the allegation relates to a matter for which it would be appropriate for the GOC to consider taking criminal proceedings. The Registrar can inform this decision by obtaining further information from the person who is the subject of the allegation (the suspect), the person who has made the allegation (the informant) and/or a third party.

If the Registrar is of the view that the GOC should not consider issuing criminal proceedings, the Registrar must notify the informant (if known) of this decision and the reasons for the decision.

If the Registrar is of the view that the GOC should consider issuing criminal proceedings, the Registrar must deal with the allegation in accordance with the following paragraphs.

Stage 2: Investigation

The Registrar shall investigate the allegation by gathering evidence, including through the instruction of enquiry agents and external lawyers in appropriate cases.

Stage 3: Decision on Prosecution

Following the investigation, the Registrar shall determine whether to:-

- i. Take no action;

- ii. Obtain an undertaking from the suspect or take other informal action;
- iii. Refer the matter to the GOC's Fitness to Practise department, another regulator, the police or the Crown Office and Procurator Fiscal Service (in Scotland);
- iv. Institute a prosecution (in England & Wales or Northern Ireland).

In deciding whether to prosecute, the Registrar must consider whether there is sufficient evidence for a prosecution (the evidential test) and whether a prosecution is required in the public interest (the public interest test). The Registrar must have regard to current guidance regarding these tests, as contained within this protocol and in the relevant code for public prosecution:-

- 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;
- In Northern Ireland, the Code for Prosecutors issued by the Public Prosecution Service of Northern Ireland.

The Registrar must at all times have regard to the GOC's overriding objective of protecting, promoting and maintaining the health and safety of the public. This might result in the Registrar deciding that the GOC should not issue proceedings even where the allegations are serious or sensitive.

The Evidential Test

The Registrar may determine to issue criminal proceedings only where there is sufficient evidence for a realistic prospect of conviction against each suspect on each charge.

In assessing the evidence, Registrar must have regard to the following factors:-

- i. Whether it is more likely than not that a properly directed tribunal will be satisfied to the criminal standard of proof that the suspect committed the alleged offence;
- ii. What the suspect's potential defences might be, whether general or specific, and how these defences might affect the prospects of conviction;
- iii. Any potential for any of the evidence to be excluded by the court, whether on the grounds of technical inadmissibility or on legal grounds including abuse of process or breach of the Human Rights Act 1998;
- iv. The reliability of the evidence, including the credibility of the witnesses and any conflict in the evidence;
- v. The possibility of any further evidence becoming available.

The Public Interest Test

Even where there is sufficient evidence for a realistic prospect of conviction, the Registrar may not issue proceedings unless the public interest requires a prosecution.

The question for the Registrar is whether a prosecution is necessary to serve the interests of the public, not whether a prosecution would serve the interests of the optical or other professions. In considering this issue, the Registrar must have regard to all the circumstances of the case, including details of the offence, the circumstances of the suspect and the impact of the offending behaviour on the health and safety of the public. The effect on a profession's commercial interests is not a relevant factor.

The following is a non-exhaustive list of factors that might be relevant to the public interest:

- i. Whether the offending activity is ongoing or has ceased;
- ii. The length of time over which the offending activity continued;

- iii. Whether the offence was committed intentionally or as a result of a mistake or misunderstanding;
- iv. Whether the offending is likely to be continued or repeated;
- v. Whether a member of the public was harmed or put at risk of harm by the offending;
- vi. Whether the person harmed, or put at risk of harm, was vulnerable by reason of age or infirmity;
- vii. Whether a prosecution is likely to have an adverse effect on the victim's physical or mental health;
- viii. Whether the prosecution is likely to have a significant effect on maintaining public confidence in the profession or in deterring others from committing an offence;
- ix. Whether the offending involved a breach of trust or abuse of position;
- x. Whether the suspect has a previous conviction or other adverse finding, including a finding by a regulator;
- xi. Whether the suspect has breached an undertaking to the GOC or another body, or has declined an opportunity to provide an undertaking;
- xii. Whether the suspect was warned prior to committing the offence;
- xiii. Whether the suspect is likely to be subject to a regulatory investigation, particularly for similar or related activities, whether by the GOC or another regulator;
- xiv. Whether the suspect is likely to be subject to a separate criminal investigation, whether by the police or another prosecuting agency;
- xv. Whether the court is likely to impose no penalty or a nominal penalty.

The above factors are not all of equal importance, and the relative importance of a factor will be determined by the individual circumstances of each case.

In deciding whether the public interest test has been met, the Registrar must make an overall assessment in the light of all the circumstances. A prosecution might be in the public interest even where there are a number of factors pointing against a prosecution; similarly, a prosecution might not be required in the public interest even where there are a number of factors pointing towards prosecution.

Recording the Decision on Whether to Prosecute

The Registrar's decision to prosecute must be recorded in writing as soon as possible, and must be reported to the GOC's Council at the following Council meeting.

The Registrar must maintain a list of all decisions, and provide copies of the list to the Chair of the Council, the Head of the Fitness to Practise department and the Head of the Registrations department.

Action Following the Decision on Whether to Prosecute

Following the decision, the Registrar may:-

- i. Write to the suspect, including asking the suspect to cease the alleged activity and desist from continuing or repeating such activity;
- ii. Take other informal action, including asking the suspect for an undertaking;
- iii. Notify the informant (if known) and any other parties of the decision;
- iv. Report the matter to another agency;
- v. Conduct such further investigation as might be appropriate;
- vi. Institute a prosecution by laying an information in the Magistrates court.

Delegation and Consultation

The Registrar may delegate any or all of the above functions to the Director of Regulatory Services and/or such other person as the Registrar considers appropriate.

The Registrar or delegate, if not legally qualified, must obtain legal advice from an in-house or external lawyer before making a decision on whether to issue proceedings.

The Registrar or delegate, whether or not legally qualified, may at any stage consult any additional sources, including obtaining specialist legal advice.

A decision that might (in the opinion of the decision maker) have major implications for the GOC, must be made or endorsed by the Registrar and must be notified to the Council Chair as soon as possible.

Further information

For further information, please contact the office of the Registrar, General Optical Council, 10 Old Bailey, London EC4M 7NG (Telephone: 020 7580 3898, Email LC@optical.org).

Annex 1 to the protocol for criminal prosecutions

Purpose

This annex has been produced to assist the Registrar in applying the protocol in line with our current illegal practice strategy.

Background

In 2011, we published a revised *Protocol for criminal prosecutions* (“the protocol”) to govern the conduct of investigations and the decision on whether to prosecute suspected criminal offences under the Opticians Act 1989 (“the Act”).

The protocol set out three procedural stages in managing allegations of illegal practice:

- Stage 1: Initial screening;
- Stage 2: Investigation;
- Stage 3: Decision on prosecution.

In 2013, we began a review of our strategy for tackling illegal practice. After commissioning risk research and conducting a consultation, we developed a multi-pronged approach to reducing harm. We published our revised strategy in 2014.

Following publication of our strategy, we reviewed our processes to ensure that we handle illegal practice complaints in line with our new strategy as well as our protocol.

Introduction

Illegal practice complaints should be approached in a methodical, targeted and risk-focussed way. This approach is in line with our strategy, and also accords with the principles of good regulation: to be agile, transparent, proportionate, consistent and accountable. Legal action is not always proportionate or practical; for example, it might be

more effective to raise public awareness of safe practice, issue a suspected offender with a warning or obtain an undertaking to cease and desist from unsafe practice. We can also refer complaints to another organisation better placed to investigate and take enforcement action, including for example trading standards officers or another regulator.

Procedure

Stage 1: Initial screening

We will first apply a threshold test to decide whether it is appropriate for us to act on a complaint. This will result in closure of the following:

- Complaints that do not indicate a breach of the Act (e.g. where the alleged offending occurred outside the United Kingdom or the suspected offender is based abroad);
- Complaints against GOC registrants (which should be managed through our fitness to practise process); and
- Complaints where there is no identifiable suspect.

Stage 2: Investigation

We will investigate all allegations by obtaining sufficient evidence to assess the nature of the complaint.

Our assessment will include consideration of the following factors: reported harm, proportionality, public confidence, targeting and consistency.

i. Reported harm

We will consider bringing a prosecution in all cases of reported harm. This could, for example include a report that someone's vision was damaged as a result of illegally supplied contact lenses.

ii. Proportionality

We will identify and target the issues of greatest risk to public safety. We will consider the risks from the alleged offending and the potential benefits to public safety, in identifying the most appropriate action. For example, it might be more proportionate to work with trading standards officers in managing complaints concerning zero powered contact lenses.

iii. Public confidence

We will consider whether there are particular factors in a case that could significantly influence public confidence in the optical professions. For example, we might be more likely to take action against a suspect who is a registered professional or has a high public profile.

iv. Targeting

Our strategy recognises that we have limited powers of investigation and enforcement. Further, we face significant challenges in taking action against suppliers of contact lenses, particularly as many online suppliers are based overseas. We will target resources on practices that pose the greatest risk to public health and safety, for example someone pretending to be registered after being erased by the GOC's Fitness to Practise panel.

v. Consistency

We will aim to adopt a similar approach in comparable circumstances, in order to achieve similar results. This does not mean standardisation of procedure, as each case will be considered on its own merits. We recognise that there are multiple aspects that need to be evaluated and considered in each case.

In all cases, we will write to the suspect outlining the relevant requirements of the Act, consider informal action and liaise with any appropriate external agencies.

Stage 3: Decision [on prosecution]

The protocol sets out the following potential options following investigation:

- i. Take no action;
- ii. Obtain an undertaking from the suspect or take other informal action;
- iii. Refer the matter to the GOC's Fitness to Practise department, another regulator (including trading standards officers), the police or the Crown Office and Procurator Fiscal Service (in Scotland);
- iv. Institute a prosecution (in England and Wales or Northern Ireland).

Options (i), (ii) and (iii) will usually be most appropriate for the following complaints:

- Supplying spectacles to adults;
- Supplying prescription contact lenses to adults; and
- Supplying zero powered contact lenses to adults.

Option (iv) will usually be appropriate only for the following complaints:

- Conducting sight tests;
- Fitting contact lenses;
- Misusing a protected title or pretending to be registered;
- Supplying appliances to children or vulnerable users; and
- Any case of reported harm.

However, all decisions must be made in the light of the overriding objective to protect, promote and maintain the health and safety of the public. This may result in the Registrar determining to take no action or direct a prosecution in relation to any complaint.