

**COUNCIL**

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PUBLIC**

**Criminal Cases - Revised Protocol on Criminal Investigations and Prosecutions**

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For decision

**Issue:**

The GOC's protocol on criminal cases has been redrafted in line with the Council decision of 27 January 2011, and a copy of the draft revised protocol is attached at Annex 1 to this paper.

**Recommendation to Council:**

It is recommended that Council approve and endorse the revised draft protocol.

**Annexes:**

The following annexes are attached to this paper:

Annex 1: Draft Revised Protocol

Annex 2: Current Protocol, approved by Council on 22 June 2006

**Further information:**

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**Criminal Cases - Revised Protocol on Criminal Investigations and Prosecutions**

For decision

**Background/Introduction:**

1. Council made the following decisions at its meeting on 27 January 2011:
  - 1.1. To delegate to the Registrar and not the Investigation Committee the decision whether or not to take proceedings on behalf of the Council;
  - 1.2. To agree to the recruiting of a new lawyer so that prosecutions in a Magistrates Court are generally conducted by in-house advocates;
  - 1.3. To agree to the revision of the Protocol on criminal cases;
  - 1.4. To agree that investigations should be conducted thoroughly as appropriate and where necessary with the use of private enquiry agents;
  - 1.5. To agree to the removal of the ban on bringing prosecutions in respect of allegations of unlawful sale (under Section 27 of the Opticians Act).
2. The GOC's protocol on criminal cases has been redrafted in line with the decisions at Paragraphs 1.1, 1.3 and 1.4 above, and a copy of the draft revised protocol is attached at Annex 1 to this paper. A copy of the previous protocol is at Annex 2.

**Discussion:**

3. The revised protocol delegates to the Registrar the decision on whether to investigate or bring a prosecution, and enables a prompt and thorough investigation in appropriate cases. This protocol will be supplemented by detailed internal guidance to assist the decision maker.
4. The main amendment is to remove the requirement for all decisions to be referred to the Investigation Committee and for mandatory consultation of Council members. The Registrar has discretion on whom to consult, and the protocol recognises that the Registrar may at any stage consult appropriate persons.
5. The revised protocol contains additional safeguards in that there are new requirements to report each decision to the Council, and to provide monthly reports to the Council Chair as well as to the Head of Fitness to Practise and the Head of Registrations. The Registrar has power to delegate decisions to the Director of Regulatory Services and/or other persons, but all major decisions

must be endorsed by the Registrar and notified to the Council Chair as soon as possible.

6. The revised protocol provides specific guidance on the evidential and public interest tests that the Registrar must apply when deciding whether to investigate or prosecute a suspected criminal offence. The decision making process is governed by an overriding objective: to protect, promote and maintain the health and safety of the public.
7. The GOC intends to publish a simple explanation of the protocol, in particular to explain that the protocol deals with the formal part of the process leading to the institution of criminal proceedings but that an allegation will not necessarily result in prosecution.

**Recommendation:**

8. Council is recommended to endorse the revised protocol.

**Resource implications:**

9. The GOC recruited a new lawyer on 27 April 2011, in accordance with Council's decision at Paragraph 1.2 above.
10. The GOC's in house lawyers have been managing criminal cases in house since the end of 2010, and external lawyers are not currently instructed in any criminal case. A fledgling criminal investigation procedure, which includes a letter before action, cease and desist letter and an invitation to provide undertakings, is being developed, and the GOC has taken preliminary steps in relation to a number of allegations.

**Equality and diversity implications:**

11. An impact assessment has been carried out. There are no adverse effects.

**Human Rights Act implications:**

12. An impact assessment has been carried out, and all prosecutions will be conducted in accordance with the Human Rights Act.

**Stakeholder engagement:**

13. The following have been consulted, with generally positive responses:
  - 13.1. Association of Optometrists
  - 13.2. Association of British Dispensing Opticians
  - 13.3. Federation of Ophthalmic and Dispensing Opticians
  - 13.4. British Contact Lens Association

- 13.5. Association of Contact Lens Manufacturers
- 13.6. The College of Optometrists
- 13.7. Federation of Manufacturing Opticians
- 13.8. Chair of the GOC's Investigating Committee
- 13.9. Public Stakeholder group
- 13.10. Registrants Stakeholder group.

## PROTOCOL FOR CRIMINAL PROSECUTIONS

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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 consult or notify another agency in relation to the matter, including the GOC's Fitness to Practise department, 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 another agency, including 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, 41 Harley Street, London, W1G 8DJ (Telephone: 020 7580 3898, Fax: 020 7436 3525).

## **PROTOCOL FOR THE INVESTIGATION AND PROSECUTION OF SUSPECTED CRIMINAL OFFENCES**

### **1. Receipt of evidence**

If the Council receives information that an individual or corporate body may have committed a criminal offence by contravening one of the sections in Part 4 of the Opticians Act 1989, the Registrar (or a person nominated on his behalf) will deal with the information, on behalf of the Council, in accordance with the following paragraphs.

### **2. Investigation of suspected offences**

2.1 If possible, members of the public or registrants who notify the Council of a potential offence will not be called upon to give evidence.

2.2 The Registrar will liaise with any body which he believes may have an interest in being notified of the facts of the case in order to consider prosecution of other criminal charges or the bringing of fitness to practise proceedings (whether or not described as such) and may agree to investigate the Opticians Act offence in co-operation with that body.

2.3 The Registrar will therefore seek to gather evidence of an offence via the obtaining of relevant documents, photographs or goods etc. (via the instruction of enquiry agents) and the interviewing of relevant witnesses (via the instruction of external solicitors or otherwise). The Registrar shall (in order to obtain guidance on relevant clinical or professional matters) consult with the Council Members nominated by the Standards Committee from time to time.

### **3. Assessment of evidence**

3.1 Once evidence has been obtained, the Registrar will consult with the Chairmen of the Council's committees and make an assessment as to whether to proceed in light of:

- (a) the evidential test set out in the Crown Prosecution Service Code for Crown Prosecutors (if the suspected offence took place in England and Wales),
- (b) the evidential test set out in the Public Prosecution Service Code for Prosecutors (if the suspected offence took place in Northern Ireland), or
- (c) the evidential considerations set out in the Crown Office and Procurator Fiscal Service Prosecution Code (if the suspected offence took place in Scotland),

or the like provisions of any replacement guidance.

- 3.2 The Registrar may take such legal advice as he deems necessary in order to undertake that assessment.
- 3.3 If the Registrar determines that the matter should not proceed, he will:
- (a) if it appears that the activities investigated may have involved a current registrant of the Council, refer the evidence to the Fitness to Practise Investigations Manager;
  - (b) if it appears that the activities investigated did not involve any current registrant of the Council, close the Council's file.

#### **4. Notification to the suspect**

- 4.1 If the Registrar determines that the matter should proceed, he will write to the suspect, disclosing the evidence upon which the Council would seek to rely and offer him 14 days to make representations in relation to the evidence. The evidence may also be disclosed to the Fitness to Practise Investigations Manager for investigation under section 13D(5) or 13E(3).
- 4.2 If the suspected offence arises from a continuing act or omission, the Registrar will also invite the suspect to provide an undertaking that any such act or omission will cease forthwith (or within such reasonable timescale as the Registrar may determine).

#### **5. Report to the Investigation Committee**

Once the timescale for the receipt of representations and/or cessation of prohibited activity has expired, the Registrar will provide the Investigation Committee with the following information:

- (a) details of the suspect;
- (b) details of the suspected offence and the circumstances of its commission;
- (c) details of the evidence available;
- (d) any representations made by the suspect;
- (e) confirmation that the matter is not subject to investigation by the police or the NHS Counter Fraud and Security Management Service, or, having been so investigated, is not to be the subject of a prosecution;
- (f) his opinion that sufficient evidence is available to support a reasonable prospect of conviction.

#### **6. Decision to prosecute**

- 6.1 The Investigation Committee will consider whether, in the interests of protecting, promoting and maintaining the health and safety of the public, a recommendation for the issue of court proceedings should be made to
- (a) the Crown Prosecution Service (in England and Wales),
  - (b) the Public Prosecution Service (in Northern Ireland), or

(c) the Crown Office and Procurator Fiscal Service (in Scotland).

Other than in Scotland, the Investigation Committee may decide to issue court proceedings in the name of the Council.

6.2 This decision should be made, taking into account:

- (a) the evidential and public interest tests set out in the Crown Prosecution Service Code for Crown Prosecutors (if the suspected offence took place in England and Wales),
- (b) the evidential and public interest tests set out in the Public Prosecution Service Code for Prosecutors (if the suspected offence took place in Northern Ireland), or
- (c) the evidential and public interest considerations set out in the Crown Office and Procurator Fiscal Service Prosecution Code (if the suspected offence took place in Scotland),

or the like provisions of any replacement guidance.

6.3 The following additional matters should also be considered:

- (a) whether the suspect was qualified to undertake the activity in question, or, in the case of a body corporate, was eligible for registration at the time of the alleged offence;
- (b) whether the suspect is eligible for registration;
- (c) whether the suspect is now registered;
- (d) the registration history of the suspect, if any;
- (e) whether this would be the first occasion upon which the suspect would have committed an offence under section 24, 25, 27 or 28.

6.4 The Committee may take such legal advice as they deem necessary in order to make that decision.

## **7. Applications for compensation orders, confiscation orders and costs**

7.1 In any case which results in a conviction, the Council may seek any of the following orders if satisfied that it is appropriate to do so:

- (a) a compensation order;
- (b) a confiscation order;
- (c) a costs order.

7.2 In determining whether or not it is appropriate to apply for a compensation order, the following should be considered:

- (a) whether the loss can be quantified;
- (b) the impact of the quantified loss;
- (c) whether there is evidence to support the quantified loss;

- (d) whether the quantified loss can be shown to be wholly attributable to the conduct of the convicted person.
- 7.3 In determining whether or not it is appropriate to apply for a confiscation order, the following should be considered:
- (a) whether the convicted person has profited from the criminal activity;
  - (b) whether the profit can be quantified;
  - (c) whether there is evidence to support the quantified profit.
- 7.4 In determining whether or not it is appropriate to apply for a costs order, the following should be considered:
- (a) the extent to which the prosecution has been funded by the Council and therefore, indirectly, by registrants
  - (b) compliance with this protocol in the bringing of the prosecution.
- 8. Failure to pay costs orders imposed in the Magistrates' Court**
- 8.1 The Council will pursue the payment of any costs ordered to be paid to it by a convicted individual or body corporate if satisfied that -
- (a) it is reasonable to do so, taking into account the amount of the costs awarded; and.
  - (b) the convicted individual or body corporate has sufficient means to pay the amount ordered (or such other amount as is agreed subsequently).
- 8.2 If the person against whom the order was made has since become registered, the Investigation Committee will be notified of the non-payment and will consider whether the matter ought to be referred to the Fitness to Practise Committee.
- 9. Document retention**
- Case files relating to prosecutions, whether successful or not, will be held (in electronic form only) for a period of not less than 5 years from the date upon which evidence was received by the Council and for such longer period as the Registrar may think fit.
- 10. Further information**
- Further information may be obtained from the Registrar of the General Optical Council, 41 Harley Street, London, W1G 8DJ (Telephone: 020 7580 3898, Fax: 020 7436 3525).

*Approved by the General Optical Council on 22<sup>nd</sup> June 2006*

## **APPENDIX**

### **Codes referred to in the Protocol**

#### *England and Wales*

Crown Prosecution Service Code for Crown Prosecutors

[http://www.cps.gov.uk/victims\\_witnesses/code.html](http://www.cps.gov.uk/victims_witnesses/code.html)

#### *Northern Ireland*

Public Prosecution Service Code for Prosecutors

<http://www.ppsni.gov.uk/site/default.asp?CATID=77>

#### *Scotland*

Crown Office and Procurator Fiscal Service Prosecution Code

<http://www.procuratorfiscal.gov.uk/Publications/2001/05/prosecutioncode>