

GENERAL DENTAL COUNCIL'S POLICY STATEMENT ON ENFORCEMENT OF DENTISTS ACT OFFENCES

INTRODUCTION

The General Dental Council ("GDC") is the statutory body which regulates dental professionals in the UK. All dentists, dental nurses, dental technicians, clinical dental technicians, dental therapists, dental hygienists and orthodontic therapists must be registered with us to work in the UK.

Our key purpose is public protection. Our work is funded by the annual retention fees paid by those who must register with us to practise.

The GDC has a dedicated team who consider allegations of illegal practice reported to it.

This policy statement sets out the approach to be adopted by the GDC when considering an allegation of the commission of an offence by a person under any of the following sections of the Dentists Act 1984 (the "Dentists Act"):

- s.38: the practice of dentistry (as defined in s.37 of the Dentists Act) by laymen. For example, dentistry performed by an individual who is not registered with the GDC.
- s.39: the use of practitioners' title by laymen. For example, the title *dental technician* being used by an individual who is not registered with the GDC.
- s.41: carrying on the business of dentistry (as defined by s.40 of the Dentists Act) by laymen. For example, operating a dental practice when not registered with the GDC.
- s.43 (1): carrying on the business of dentistry as a body corporate when a majority of its directors are not registered dentists or dental care professionals.
- s.43 (2): being a director of a body corporate carrying on the business of dentistry at any time when erased or suspended from a register.

This statement covers the purpose of enforcement, the criteria for investigation and prosecution of offences and applications that may flow as a result of a conviction. This statement also outlines the GDC's policy in relation to publicity prior to and after prosecution.

THE PURPOSE OF ENFORCEMENT

The purpose of enforcement by the GDC is to:

- Protect members of the public;
- Promote and achieve sustained compliance with the Dentists Act in the public interest;

- Ensure that persons who fail to comply with the Dentists Act are held to account, which may include bringing alleged offenders before the courts in England and Wales, or recommending prosecution in Scotland or Northern Ireland.

Investigating the circumstances following the receipt of allegations is essential before taking any enforcement action. It should be noted that enforcement by the GDC is distinct from civil claims for compensation and is not undertaken in all circumstances where civil claims may be pursued, nor with the aim of assisting in such claims.

In deciding what resources to devote to these investigations, the GDC will have regard to the principles of enforcement set out below and the objectives published in the GDC's annual business plan.

THE PRINCIPLES OF ENFORCEMENT

The GDC believes in the fair enforcement of the sections of the Dentists Act. This should be informed by the principles of Right-touch Regulation:¹

- the principles of proportionality in applying the law and securing compliance;
- consistency of approach;
- targeting of enforcement action;
- transparency about how the GDC operates and what those being investigated for criminal offences can expect;
- accountability for the GDC's actions;
- agility of approach and action

Proportionality

Proportionality means evaluating taking enforcement action given the resource and other implications of doing so, against the risk of possible harm to public safety and/or the seriousness of any breach. Action taken by the GDC should be proportionate. In practice, this means that the GDC will take account of the seriousness of the alleged offence, what the Dentists Act requires, the extent of risk to the public resulting from any breach and the available GDC resources.

¹ <http://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-regulation-2015.pdf?sfvrsn=12>

Targeting

Targeting means focusing the GDC's resources on the most serious breaches of the Dentists Act in the public interest.

Consistency

Consistency means adopting a similar approach in comparable circumstances to achieve similar results. It does not mean standardisation of procedure, as each case will be considered on its own merits. The GDC recognises that there are multifaceted reasons that will need to be evaluated and considered in each case. The GDC will ensure that its decisions and reasons are recorded so that it can be held accountable for its decisions.

Transparency

Transparency means helping individuals who come under investigation to understand what is expected of them and what they should expect from the GDC. Transparency also requires the GDC to ensure that potential witnesses and other parties are kept informed, subject to legal constraints. In addition to transparency in individual cases, the GDC also recognises the importance of being open and transparent about our enforcement policy, as evidenced by the publication of this document.

Accountability

To ensure accountability the GDC has policies, standards and procedures in place against which it can be judged. The GDC also has a system for handling and processing comments and complaints, if any.

Agility

Agility means anticipating changes that are going to occur in the GDC's field and considering what, if any, action should be taken to mitigate any risks to the public.

INVESTIGATION

Upon receipt of information which alleges the commission of an offence under the Dentists Act, a decision will be made as to whether to commence an investigation.

In considering whether or not it is appropriate to commence an investigation, the GDC will consider each case on its own facts and will adopt a merits based approach, recognising the principles of

enforcement identified above. Factors that may be taken into account in deciding whether to commence an investigation are:

- Any harm that has resulted as a consequence of the offence(s).
- The number of patients and / or members of the public treated or affected during the relevant time.
- Whether the offending activity is on-going or has ceased.
- The length of time over which the offence(s) took place.
- Whether the offending is likely to be continued or repeated, for example, by a history of recurring conduct.
- Whether the GDC has engaged with the individual or company before.
- Whether the individual or company was warned prior to committing the offence.
- Whether we have prosecuted the individual or company before.
- Whether the individual has a previous conviction or other adverse finding, including a finding by a regulator.
- Whether the offending involved a breach of trust or abuse of position.
- Whether there are any other aggravating features (such as age or vulnerability of the complainant).
- The number of complaints received.
- Whether the individual is subject to a regulatory determination, such as suspension by the GDC from the register of dentists or dental care professionals.
- The mitigation offered by the individual.
- Whether the individual has revealed or admitted the illegal practice.
- Whether the matter could be better pursued by another body (such as Police, ASA, Trading Standards, CQC, GMC, NMC etc.).
- Whether the GDC could work in partnership with another body (such as Police, Trading Standards, CQC, GMC, NMC etc...).
- 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.
- Whether a prosecution is likely to have an adverse effect on the complainant's physical or mental health.

This is non-exhaustive list and other factors may also be considered by the GDC. The above factors are also not all of comparable importance. The weight of each factor will be determined by the GDC's reviewing lawyer when considering the individual circumstances of each case.

During the course of the investigation, if it is deemed appropriate to ask an individual questions under caution, these questions may be put either by way of an oral recorded interview or by way of written correspondence. The individual will be advised of his right to independent legal advice and cautioned in accordance with the law. The decision as to whether to question under caution and, if so, which method to use is made on a case by case basis by the reviewing lawyer.

If at any time during the course of the investigation, it appears to the reviewing lawyer that sufficient evidence is unlikely to be obtained to bring a prosecution, they may decide to close the case.

PROSECUTION

Once an investigation has been carried out, a decision will be made as to whether to prosecute. The reviewing lawyer, authorised on behalf of the GDC, applies the provisions of one of the following:

- (a) the two-stage 'Full Code Test' set out in the Crown Prosecution Service Code for Crown Prosecutors (if the suspect offence took place in England and Wales)²;
- (b) the two-stage 'Test for Prosecution' set out in the Public Prosecution Service Code for Prosecutors (if the suspected offence took place in Northern Ireland)³; 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)⁴.

The GDC relies upon the common law power to instigate private prosecutions preserved under section 6 (1) of the Prosecution of Offenders Act 1985.

TIME LIMITS IN RELATION TO SUMMARY ONLY OFFENCES

Under s.217 of the Magistrates Court Act 1980, an information (which starts the court process) alleging a summary only offence must be laid within 6 months of the date of the offence itself. This is applicable to offences committed under sections 39, 41, 43(1) and 43(2) of the Dentists Act.

² http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html

³ <http://www.ppsni.gov.uk/Code-for-Prosecutors-5017.html>

⁴ <http://www.crownoffice.gov.uk/about-us/what-we-do>

The time limit for an offence under section 38 of the Dentists Act is also subject to a 6 month time limit; however, this can be calculated in a different way. Two provisions of the section are relevant:

s.38 (3): Summary proceedings for an offence under this section may be brought within the period of six months beginning with the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge; but no such proceedings shall be brought by virtue of this subsection more than two years after the commission of the offence.

s.38(4): For the purposes of subsection (3) above a certificate signed by or on behalf of the prosecutor and stating the date on which such evidence as is mentioned in that subsection came to his knowledge shall be conclusive evidence of that date, and any certificate purporting to be so signed shall be taken to have been so signed unless the contrary is proved.

Sufficient evidence to warrant a prosecution means sufficient evidence to provide a realistic prospect of conviction. Information is not evidence, nor is a letter of complaint. A witness statement and properly produced exhibits are examples of evidence.

The relevant time for calculating time limits commences when the latest piece of evidence, which forms the body of evidence upon which the prosecutor⁵ either then or subsequently takes the decision to prosecute, comes to the knowledge of the prosecutor. This is not the forming of opinion, but rather the date on which the sufficient evidence came to the knowledge of the prosecutor.

MAXIMUM PENALTY FOR DENTISTS ACT OFFENCES

On 12 March 2015, subsections (1), (2) and (4) of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 were brought into force. This means that Magistrates' Courts are no longer restricted to specified upper limits when deciding what fine to impose upon conviction (s.85(1)). In real terms, this means that any criminal offence committed under the Dentists Act 1984 no longer carries a maximum penalty of a fine not exceeding the fifth level on the standard scale (£5000)⁶. The maximum penalty now available to the court for any offences contrary to sections 38, 39, 41 and 43 of the Dentists Act 1984 is an unlimited fine.⁷

⁵ The GDC is the prosecutor.

⁶ As per ss.38(2), 39(3), 41(1B) and 43(3)

⁷ s.85(1) Legal Aid, Sentencing and Punishment of Offenders Act 2012

THE DECISION MAKING PROCESS

General principles

The reviewing lawyer, who is authorised to make decisions on behalf of the prosecutor, considers each case on its own facts and merits and applies the following general principles to every case:

- Aims to be fair, independent and objective.
- Must not let any personal views about ethnic or national origin, disability, sex, religious beliefs, political views or the sexual orientation of the suspect, informant or witness influence their decisions.
- Must not be affected by improper or undue pressure from any source.
- Must always act in the interests of justice and not solely for the purposes of obtaining or securing a conviction.

The reviewing lawyer will also provide guidance and advice to investigators throughout the investigative and prosecuting process. This may include lines of inquiry, evidential requirements and assistance in any pre-charge procedures. The reviewing lawyer will be proactive in identifying and, where possible, rectifying any evidential deficiencies and in bringing to an early conclusion those cases that cannot be strengthened by further investigation.

It is the duty of the reviewing lawyer, on behalf of the prosecutor, to ensure that all relevant evidence in relation to a case is put before the court and that obligations of disclosure are complied with.

In addition to the above principles, since the GDC is a public authority for the purposes of the Human Rights Act 1998 (“the HRA”), the reviewing lawyer must apply the principles of the European Convention on Human Rights in accordance with Section (6) of the HRA. This section states that it will be unlawful for the public authority to act in a way which is incompatible with the ECHR.

The reviewing lawyer will consider whether there are European Convention rights which would be relevant to the decision to prosecute. For example: whether the right against self-incrimination has been infringed; how the evidence was collected and obtained; whether the right to privacy was infringed through access to correspondence or medical information. These are all subject to the test of proportionality.

A number of factors may have been taken into account when considering whether to commence an investigation. However, when deciding whether to prosecute it is only the available evidence and public interest that will be considered by the reviewing lawyer.

The Full Code Test

Once the matter has been referred to the reviewing lawyer, they will review the case to make sure that it is right to proceed with a prosecution. The reviewing lawyer will only start a prosecution when the case has passed both stages of the Full Code Test under the Code for Crown Prosecutors.⁸

The first stage is consideration of the evidence. If the case does not pass the evidential stage it must not go ahead no matter how important or serious the allegations may be. In order to pass the evidential stage, the reviewing lawyer must be satisfied that there is sufficient evidence to provide a 'realistic prospect of conviction' against the accused in relation to the charge. The reviewing lawyer must consider what the defence case may be, and how that is likely to affect the prosecution case, including its prospects of success.

A 'realistic prospect of conviction' is an objective test. It means that a bench of magistrates or a district judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the accused of the charge alleged.

When deciding whether there is enough evidence to prosecute, the reviewing lawyer must consider whether the evidence can be used and is reliable.

If the case does pass the evidential stage, the reviewing lawyer must proceed to the second stage and decide if a prosecution is in the public interest. A prosecution will usually take place unless there are public interest factors tending against prosecution, which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution.

Therefore, when deciding whether a case should be prosecuted in the courts, the reviewing lawyer should consider the alternatives to prosecution.

⁸ Or the corresponding provisions in Scotland and Northern Ireland if the offence is alleged to have been committed in those jurisdictions.

The Code for Crown Prosecutors lists some common public interest factors both for and against prosecution, emphasising that they are not exhaustive and that the factors that apply will depend on the facts of each case.

Some of the common public interest factors listed in the Code for Crown Prosecutors guidance which may be relevant to a decision to prosecute an offence under the Dentists Act are as follows:

- Severity of offence committed.
- Level of culpability of the suspect.
- The circumstances of harm caused to the victim.
- The suspect was in a position of trust or was perceived to be by the patient or customer.
- The suspect's age at the time of the offence.
- The impact on the community.
- Whether prosecution is a proportionate response.

In addition to the above factors, the reviewing lawyer will also consider whether there is a significant risk of harm to the public and whether a prosecution is likely to have an impact on the public's confidence in the profession.

The reviewing lawyer must decide how important each factor is in the circumstances of each case and go on to make an overall assessment, recording their reasons for any decision.

If the reviewing lawyer decides that the evidential test set out in the relevant guidance is not made out, and it does not appear that further enquiries would obtain evidence which would be likely to result in the evidential test set out in the relevant guidance being made out, then the reviewing lawyer shall discontinue the investigation. The individual or company complained about should be informed that should further evidence come to light the discontinuance of the investigation does not preclude the matter being re-opened at a later date.

DECISION ON PROSECUTION

After reviewing all of the evidence and making an assessment regarding public interest the reviewing lawyer shall determine whether to:

- i. Take no further action.
- ii. Send a warning letter.
- iii. Engage with the subject of the investigation by any other appropriate means;

- iv. Refer the matter to another agency (including the GDC's Fitness to Practise department, another regulator or body, the Police or the Crown Office and Procurator Fiscal Service in Scotland).
- v. Instigate a prosecution.

RECORDING DECISIONS

The reviewing lawyer will ensure that there is a detailed record made at the time of the reason for their decision in relation to a proposed prosecution and that the record is held in the case file.

APPLICATIONS FOR COMPENSATION ORDERS, CONFISCATION ORDERS AND COSTS

In a case which results in a conviction, the reviewing lawyer may seek one or more of the following orders if they are satisfied that it is appropriate to do so:

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

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.

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.

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 GDC and therefore indirectly, by registrants;
- (b) compliance with this protocol in the bringing of the prosecution.

FAILURE TO PAY COSTS ORDERS IMPOSED

In order to offset the impact of bringing a prosecution on the annual retention fee of the GDC's registrants, the GDC will pursue the payment of 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).

If the person against whom the order was made has since become registered, the Fitness to Practise department at the GDC will be notified of the non-payment of costs and the Fitness to Practise department shall consider and assess whether the matter ought to be referred to the Investigating Committee.

PUBLICITY

The GDC will always consider whether it is appropriate to issue a press release to the media drawing attention to factual information about charges which have been laid before the courts prior to any hearing taking place. The GDC will also publicise any conviction which could help to ensure public protection and which could draw attention to the need to comply with the Dentists Act.

Previous prosecutions brought by the GDC can be found on the GDC's website: <https://www.gdc-uk.org/>

January 2017.

APPENDIX

Codes referred to in this policy document:

- **England and Wales**

Crown Prosecution Service Code for Crown Prosecutors

http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html

- **Scotland**

Crown Office and Procurator Fiscal Service Prosecution Code

<http://www.procuratorfiscal.gov.uk/publications/prosecution-policy-and-guidance>

- **Northern Ireland**

Public Prosecution Service Code for Prosecutors

<http://www.ppsni.gov.uk/Code-for-Prosecutors-5017.html>

ANNEX A: OPERATIONAL GUIDANCE FOR THE ILLEGAL PRACTICE TEAM

In addition to the GDC's enforcement policy outlined above, this annex sets out the operational guidance and general principles to be adopted by the Illegal Practice team when processing illegal practice cases.

This guidance will be reviewed on an annual basis. Any review will take into account the business and resourcing needs of the GDC along with any other factors that the GDC considers appropriate. In addition to the annual review, the GDC also reserves the right to review and amend this document at any other time.

When considering whether to investigate a complaint or information, the Illegal Practice team shall have regard to the principles of proportionality as set out above, and also to the resources available to both the team and the GDC.

Owing to resources, the Illegal Practice team cannot investigate all complaints received by the GDC. Accordingly, the Illegal Practice team will, where appropriate to do so, prioritise non-tooth whitening related illegal practice cases over cases concerning tooth whitening where there is no complaint of patient harm. Where patient harm is alleged following tooth whitening, the Illegal Practice team will open a case for further investigation.

Prior to commencing any investigation, the Illegal Practice team will consider other methods of disposal in each case. For example and wherever possible, the team will utilise the assistance of other bodies or organisations where such bodies or organisation may be better placed to ensure the successful resolution or disposal of the complaint.

The team will also consider whether it is appropriate and proportionate, in the circumstances of each particular case, to write to the individual or company complained of warning them about potential breaches of the Dentists Act and to ensure compliance with it.

Illegal Practice complaints:

Cases concerning a suspended or former GDC registrant will be given priority by the Illegal Practice team. Owing to the GDC's statutory responsibilities, to ensure patient safety and also to ensure public confidence in the GDC's committee's orders, ensuring compliance with orders imposed by one of the GDC committees is a key priority for the Illegal Practice team.

Accordingly, should the team receive a complaint regarding a registrant who is suspended, or temporarily or permanently removed from the register by the Professional Conduct Committee for example, this matter would result in a case being opened and the matter being investigated fully.

In relation to all illegal practice complaints received by the Illegal Practice team, each case shall be assessed on its own merits.

Illegal Practice complaints concerning tooth whitening:

Where a complaint concerning tooth whitening is received, the Illegal Practice team shall consider the following criteria prior to opening a case:

- Does this complaint contain patient harm?
- If so, a case shall be opened and investigated.
- If not, then the team will consider whether it is appropriate to issue a warning letter to the individual or company complained.

When considering whether to issue a warning letter the team will:

- Establish if the individual or company have been contacted by the GDC previously.
- Identify whether any previous contact was made prior to the *GDC v Jamous* judgment. If contact was made prior to the 10 May 2013, then a further warning letter shall be sent to the individual or company highlighting the High Court's judgment.
- Consider whether it is more appropriate to open a case for investigation.

In addition to the above, the GDC also reserves the right to investigate and prosecute a case where it believes that investigating and prosecuting that case may have such a significant impact on the public's confidence in the profession, or in reducing the number of complaints received by the GDC, that it would be beneficial for it to do so.

January 2017