



Council
6 November 2014
Protection of Title Enforcement Policy

Classification	Public
Purpose	For decision
Issue	The GOsC has the power to prosecute persons who commit an offence under s32 (1) of the Osteopaths Act 1993. This paper presents a draft Enforcement Policy setting out how and when these powers will be used.
Recommendation	To approve the draft Enforcement Policy.
Financial and resourcing implications	Costs of investigating and prosecuting protection of title cases are provided in the Regulation Department budget. The draft policy provides for the GOsC to seek its costs in all successful prosecutions.
Equality and diversity implications	None
Communications implications	The GOsC business plan 2013-14 provided for a communications programme to encourage Registrants to report potential protection of title breaches. This policy will be publicised in order to continue to raise awareness of protection of title. The policy will also be made available on the GOsC website to inform the public of the approach taken by the GOsC.
Annex	Draft Protection of Osteopathic Title Enforcement Policy
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Background

1. The Corporate Plan 2013-16 states that the GOsC ‘...will take appropriate action against unregistered individuals describing themselves as osteopaths, prosecuting those who do not desist from doing so’.
2. The GOsC’s powers to protect the osteopath title are contained in s32(1) of the Osteopaths Act 1993, which reads:

A person who (whether expressly or by implication) describes himself as an osteopath, osteopathic practitioner, osteopathic physician, osteopathist, osteotherapist, or any other kind of osteopath, is guilty of an offence unless he is a registered osteopath.

3. The GOsC is the de-facto prosecuting authority for offences under S32 (1). The first private prosecution was brought by the GOsC in 2005. Since then, the GOsC has brought 2 or 3 private prosecutions each year and has been successful in all but one 1 case.
4. In Scotland it is not possible for the GOsC to bring its own private prosecutions. Rather, the GOsC can refer cases to the Crown Office and Procurator Fiscal Service, who may decide to prosecute. Alternatively it can petition for an interdict, which would prevent the person from carrying on activities that put them in breach of s32 (1). Failure to comply with the interdict is actionable as a contempt of court and proceedings for a breach of interdict could be brought by the GOsC. Such breach is punishable by fine or imprisonment.
5. The GOsC has obtained an interdict against one person in Scotland. This was obtained in March 2011.
6. Although the GOsC has been successfully bringing private prosecutions under s32 (1) for some years, in the interests of openness and transparency, it is appropriate that the GOsC should publish a formal enforcement policy.
7. That policy should:
 - a. apply to the whole of the UK
 - b. clearly set out the approach that the GOsC takes in order to protect the osteopathic title
 - c. be public so that any person can clearly identify how the GOsC will use its powers under s32(1) of the Act
 - d. direct the Executive to seek compliance with the law wherever possible and prosecute as a last resort
 - e. ensure that any decision to prosecute is made fairly and objectively, and in the public interest.

8. At its meeting in February 2014, the Osteopathic Practice Committee considered a draft enforcement policy and made helpful suggestions on the draft.
9. An amended policy was then presented to Council in May 2014. Council agreed that the draft policy should be the subject of consultation.
10. The draft policy confirms that the GOsC's approach is to focus on title misuse that presents a risk to patient safety and public protection and to, where possible, deter offenders and encourage on-going compliance with the law. In relation to Scotland, the draft policy provides for the Executive to either refer a case to the Crown Office or seek an interdict.
11. The draft policy recommends that the GOsC should seek the recovery of its costs for all successful prosecutions, and requires the GOsC to publicise all successful prosecutions for a breach of s32 (1).

Consultation

12. The GOsC undertook a three month consultation from 1 June to 31 August 2014 in accordance with our engagement strategy. The consultation was published on our website and published to the profession by direct email to all osteopaths, a double-page spread in the *June/July the osteopath*, as well as features in the June, July and August news e-bulletins.
13. Direct correspondence was sent to osteopathic organisations, including the Institute of Osteopathy, osteopathic educational institutions, Osteopathic Alliance and National Council for Osteopathic Research.
14. We also communicated with the professional indemnity insurers, legal teams, other regulators and public/patient representatives, including the GOsC's Patient Participation Group.
15. The consultation was also publicised on the GOsC face book page.
16. Although the face book post was seen by more than 300 people, the GOsC only received six responses to the consultation. The responses are analysed below.
17. Analysis of consultation responses:

Consultation Question	Yes	No	If no, reasons and any suggestions for improving the policy	Other comments
After reading the draft enforcement policy, did you understand clearly what actions the	5	1		<i>"How does the GOSC ensure that the actions of its Enquiry agents" are proportionate, lawful accountable and necessary?"</i>

GOSc may take when notified of a possible misuse of a protected title?				<i>As a Statutory Authority the GOSC is bound to ensure its activities are compliant with the Human Rights Act 1998 and should therefore ensure that any actions of its staff or contractors which may contravene Article 8 are carefully considered and the rationale supporting that intrusion documented."</i>
After reading the draft enforcement policy, did you understand clearly what criteria the GOSc will take into account in deciding whether or not to initiate criminal proceedings?	5	1		
After reading the draft enforcement policy, did you understand clearly the public interest test that the GOSc will apply when deciding whether or not to prosecute?	6	0		<i>"If someone misusing the title has continued to do so after receiving a cease and desist notice, then it is ALWAYS in the public interest (and the interest of osteopaths) that a prosecution takes place."</i>
Do you think that the GOSc should always seek to reclaim the costs of a criminal prosecution against the defendant if he or she pleads guilty or is found guilty?	5	1		<i>"Sometimes reclaim of costs could be a matter of judgement according to the circumstances of the case. However the terms of deciding whether to prosecute should cover any unfairness. So as usual the answer is 'it depends' and on balance, if the decision to prosecute is taken sufficiently seriously the answer above should be always to claim costs."</i>
Do you think the GOSc should seek publicity in every	6	0		

case in which it obtains a successful prosecution?				
Please provide us with any other comments you may have.				<i>"Does a Memorandum of Understanding exist with the principal law enforcement authorities concerning the sharing of evidence obtained during a GOsC investigation?"</i>

18. The number of responses to the consultation, while disappointing, may be taken as an indicator that the GOsC's draft policy is uncontroversial. The draft policy effectively codifies the matters taken into account by the GOsC when deciding whether to initiate a prosecution.
19. Recommendation 118 of Law Commissions joint report on the Regulation of Health Care Professionals¹ stated that 'The Regulators should continue to have the ability to bring prosecutions (except in Scotland) and would be required to set out their policy on bringing prosecutions in a publicly available document.'
20. In the circumstances, it is recommended that the draft policy be approved by Council and published on the GOsC website.
21. The Regulation and Registration departments are working on a standard operating procedure to underpin the prosecutions policy. Once this procedure has been agreed, compliance with key performance indicators will be monitored as part of our internal quality assurance mechanisms.

Recommendation: to approve the draft Enforcement Policy.

¹ Regulation of Health Care Professionals: Regulation of Social Care Professionals in England. April 2014. Cm 8839. Available at http://lawcommission.justice.gov.uk/areas/Healthcare_professions.htm

**Protecting the Osteopathic title
Enforcement Policy – Draft: 6 April 2014**

Introduction

1. This policy outlines the approach that the General Osteopathic Council (GOsC) will take to protect the osteopathic title from unlawful use.
2. Section 32(1) of the Osteopaths Act 1993 (the 1993 Act) makes it a criminal offence for a person, who is not registered with the GOsC to describe themselves, either expressly or by implication, as any kind of osteopath. S32(1) applies to the United Kingdom and it lists, in particular, the following protected titles:
 - Osteopath
 - Osteopathic practitioner
 - Osteopathic physician
 - Osteopathist
 - Osteotherapist
3. Offences under s32 (1) of the 1993 Act are a matter of general criminal law and the GOsC does not have exclusive control of the investigation and prosecution of such offences. This policy applies to the GOsC only. It does not apply to or affect the decisions of other law enforcement agencies or prosecuting authorities.

Purpose of a protected title

4. Many professional titles are protected by law in order to provide protection to those who seek the services of professionals. The osteopathic title provides an assurance to patients that the practitioner is competent, fit to practise and holds adequate professional indemnity insurance.
5. The Professional Standards Authority ² explains that:

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.

² Professional Standards Authority, Protecting the public from unregistered practitioners – tackling misuse of titles (February 2010)

Public protection and patient safety can be threatened by the misuse of protected titles. For example, title misuse can lead to physical or emotional harm to patients and the public, or financial loss. Misuse of protected titles can undermine public confidence in health professionals and the regulatory systems established to oversee them.

The GOsC's approach

6. To ensure that the available resources are used to their best effect, our approach is to:
 - focus on title misuse that presents a risk to patient safety and public protection
 - where possible, deter offenders and encourage on-going compliance with the law.

The procedures

7. The procedures are set out in the GOsC's *Protection of Title Procedures Guidance*. In summary, these are:
 - allegations or reports of title misuse may be made to the GOsC verbally or in writing, and they may also be made anonymously
 - all allegations and reports will be considered by the Regulation department, who will decide whether to investigate the allegation
 - the GOsC will conduct its own investigation, using enquiry agents to obtain evidence where appropriate
 - where there is evidence to suggest that there is unlawful use of the title, a cease and desist letter will be sent informing the person of the law as it relates to s32(1) of the 1993 Act, asking them to stop using the title and warning that they may be prosecuted for the offence
 - if the person continues to use the title, or initially stops but begins to use the title again in the future, the GOsC will consider whether to prosecute or recommend a prosecution³
 - if the person is located in Scotland, the GOsC will also consider whether to seek an interdict preventing the person from carrying on activities that put them in breach of s32 (1).

³ In Scotland, enforcement agencies cannot prosecute on their own behalf but must refer cases to the Crown Office and Procurator Fiscal Service.

Prosecutions

8. The decision to prosecute will be made by the Registrar or by a person with delegated authority.
9. In deciding whether to prosecute, the GOsC will:
 - act in the public interest and not solely for the purposes of obtaining a conviction
 - be fair, independent and objective
 - follow the guidance set out in the:
 - Code for Crown Prosecutors issued by the Crown Prosecution Service for England and Wales
 - Prosecutions Code issued by the Crown Office and Procurator Fiscal Service for Scotland
 - Code of Prosecutor issued by the Public Prosecution Service of Northern Ireland.
10. The decision to prosecute may be taken when:
 - the person has been informed of the law as it relates to s32(1) of the 1993 Act
 - the person has been given an opportunity to stop using the protected title
 - the person has continued to use the title, or began to use it again, having been informed of s32(1)
 - the offence has been committed within the last six months⁴
 - there is sufficient evidence for a realistic prospect of conviction
 - it is in the public interest to prosecute.

Sufficient evidence

11. There must be sufficient evidence to provide a realistic prospect of conviction against each person for each charge.
12. When deciding whether or not there is sufficient evidence to prosecute, the GOsC will consider whether the evidence is:
 - admissible

⁴ Section 127 of the Magistrates' Court Act 1980 states that for all summary offences the information must be laid with the Magistrates' Court within six calendar months of the commission of the offence.

- reliable
- credible.

Realistic prospect

13. The decision as to whether there is a realistic prospect of conviction must be based on an objective assessment of the evidence, including the impact of any defence or information put forward by the person accused.
14. The person making the decision should be satisfied that an objective, impartial and reasonable jury or bench of magistrate or judge hearing the case alone, properly directed and acting in accordance with the law, is more likely than not to convict the person accused of the charge alleged.

Public interest

15. Where there is sufficient evidence to provide a realistic prospect of conviction, the public interest in prosecuting must also be considered.
16. The GOsC's role and the purpose of a protected title are to protect the public. Therefore, a prosecution will usually take place unless there are public interest factors tending against prosecution which outweigh those tending in favour.
17. In deciding whether there is a public interest in prosecuting, the GOsC will consider:
 - whether the offending activity is on-going, has ceased, or is likely to continue, escalate or be repeated
 - the period of time over which the offending activity continued
 - whether the offence was committed intentionally or as a result of a mistake or misunderstanding
 - whether the person accused was at the time of the offence or is suffering from any significant mental ill health
 - whether a member of the public was harmed or put at risk of harm by the offending
 - whether the prosecution is likely to have a significant effect on maintaining public confidence in the profession or in deterring others from offending
 - whether the person accused was warned prior to committing the offence
 - whether a prosecution is a proportionate response to the conduct leading to the offence.

18. The questions identified are not exhaustive, and not all the questions may be relevant in every case.
19. When proceeding with a prosecution, the GOsC will:
 - ensure that the law is properly applied
 - ensure that all relevant evidence is put before the Court
 - ensure that disclosure obligations are met
 - act in accordance with the Human Rights Act 1998.

Prosecution costs

20. The GOsC is funded by Registrants' fees, which it has a duty to use responsibly. The costs of a prosecution can be high and the GOsC will seek to recover its full costs when it has successfully prosecuted an offender under s32 (1).

Working with others

21. The GOsC will liaise and co-operate with other agencies and prosecuting authorities to ensure that offenders of s32 (1) are prosecuted, where appropriate. This includes the police, Crown Prosecution Services, Crown Office and Procurator Fiscal Services, Public Prosecution Service for Northern Ireland, other health and social care regulators and Trading Standards.

Publicity

22. Publicity from convictions informs members of the public about offenders. It has also been a deterrent to others who may be misusing the title. For these reasons, the GOsC will publicise cases where it has successfully prosecuted under s32 (1).