Public business

GPhC prosecution policy (England and Wales)

Recommendation:

The Council is asked to agree the GPhC prosecution policy (England and Wales) at Appendix 1.

1.0 Introduction

1.1 As a public authority with express statutory powers to institute criminal proceedings under the Pharmacy Order 2010 it is desirable for the GPhC to have an explicit prosecution policy for England and Wales.

2.0 Key considerations

2.1 The purpose of the policy is to set out the basis on which the GPhC determines whether or not to institute criminal proceedings and the tests which are applied in making such a determination.

2.2 A number of potential prosecution issues have arisen to date and the organisation has in effect been working to the proposed policy. It is considered preferable to make the policy explicit, and to ensure that it is in line with the approach which the Council considers appropriate. The policy has been drafted to ensure that the GPhC is open and transparent regarding decisions made as to whether or not to institute criminal proceedings.

2.3 The proposed policy is substantively based on the Code for Crown Prosecutors, subject to appropriate modifications on points of detail in the light of our different status and role. The principles in the Code are sound prosecution principles which we are well advised to follow.

2.4 The proposed policy applies to prosecutions in England and Wales only. The arrangements for non-Crown prosecutions in the Scottish jurisdiction (a different
legal system) are very different, being both more restricted and procedurally more complex. Should the need arise we would need to work with the Scottish legal authorities.

3.0 **Equality and diversity implications**

3.1 Prosecution decisions always have the potential for bias. We are developing a new staged equality assessment tool, which we plan to use when it becomes available to analyse the prosecution policy, which we expect will help to identify any scope for improving the policy.

4.0 **Risk implications**

4.1 Having an explicit prosecution policy will help to reduce the risk of inconsistency and of legal challenge to prosecution decisions.

4.0 **Communications implications**

4.1 The policy will be published on the GPhC website and made available under the Publication Scheme.

5.0 **Resource implications**

5.1 The policy will ensure that the resources required for prosecution are targeted and proportionate. The number of criminal proceedings instituted by the GPhC on an annual basis is likely to be very low.

**Recommendation**

The Council is asked to agree the GPhC Prosecution Policy (England and Wales) at Appendix 1.

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24 August 2011
1. **Legal establishment of the General Pharmaceutical Council**

1.1 Article 4(1) of the Pharmacy Order 2010 ("the Order") (SI 2010 No. 231) makes provision that there is to be a body corporate known as the General Pharmaceutical Council ("the GPhC") that is to be constituted as provided for by an order of the Privy Council. On 12 March 2010 the Privy Council Order making provision for the constitution of the GPhC (SI 2010 No. 300) came into force.

1.2 On 27 September 2010 the GPhC assumed regulatory responsibility for pharmacists, pharmacy technicians and retail pharmacy premises (SI 2010 No. 1621).

2. **The main objective and principal functions of the GPhC**

2.1 Article 6 of the Order provides that the main objective of the GPhC (including its staff and committees) in exercising such of its functions as affect the health, safety or well-being of members of the public is to protect, promote and maintain the health, safety and well-being of members of the public, and in particular of those members of the public who use or need the services of registrants, or the services provided at a registered pharmacy, by ensuring that registrants, and those persons carrying on a retail pharmacy business at a registered pharmacy, adhere to such standards as the GPhC considers necessary for the safe and effective practice of pharmacy.

2.2 The principal functions of the GPhC as set out in article 4 of the Order are:

- to establish and maintain a register of pharmacists, pharmacy technicians and premises at which a retail pharmacy business is, or is to be, carried on;
- to set and promote standards for the safe and effective practice of pharmacy at registered pharmacies;
- to set requirements by reference to which registrants must demonstrate that their fitness to practise is not impaired;
- to promote the safe and effective practice of pharmacy by registrants (including, for example, by reference to any code of conduct for, and ethics relating to, pharmacy);
- to set standards and requirements in respect of the education, training, acquisition of experience and continuing professional development that it is necessary for pharmacists and pharmacy technicians to achieve in order to be entered in the Register or to receive an annotation in the Register and to maintain competence; and
- to ensure the continued fitness to practise of registrants.
3. **The power of the GPhC to institute criminal proceedings**

3.1 Schedule 1 of the Order makes further provision about the GPhC, its committees, its staff, its publications and its accounts. Paragraph 3 of schedule 1 sets out the powers of the GPhC. Paragraph 3(2)(b) states that the GPhC has, in particular, the power to institute criminal prosecutions under any enactment.

3.2 The power to institute criminal prosecutions is therefore not limited to instituting criminal proceedings only against registered pharmacists or pharmacy technicians or those operating registered retail pharmacy premises and there may be circumstances where the GPhC considers it necessary and appropriate to commence criminal proceedings against individuals/corporate bodies who are not currently registered with the GPhC.

3.3 The GPhC is a public authority for the purposes of the Human Rights Act 1998 (and equality legislation) and as such is under a duty to apply the principles of the European Convention on Human Rights at each stage of a case. The GPhC must also comply with the Criminal Procedure Rules currently in force.

4. **The decision to institute criminal proceedings and the tests to be applied**

4.1 The GPhC Council has delegated the function with regards to instituting criminal proceedings to the Registrar. Therefore, no criminal proceedings will be initiated by the GPhC unless specifically authorised by the Registrar. In determining whether criminal proceedings should be instituted the Registrar will apply the same two-stage test that is currently applied by the Crown Prosecution Service and set out in section 4 of the Code for Crown Prosecutors (see Annex 1).

4.2 When required to do so, the GPhC inspectors and/or case managers are responsible for conducting enquiries into an allegation that a criminal offence, relevant to the safe and effective practice of pharmacy (including the Pharmacy Order 2010, the Medicines Act 1968 and the Poisons Act 1972), may have been committed. Following the conclusion of the investigation, the registrar will ensure that he/she has all the information needed to make an informed decision about how best to deal with the case.

4.3 The Registrar will only authorise the institution of criminal proceedings where he/she takes the view that the alleged conduct is relevant to the safe and effective practice of pharmacy and the case passes the evidential test and the public interest test as set out in the current Code for Crown Prosecutors.

4.4 The first stage involves a careful review of all of the relevant evidence obtained during the investigation. A prosecution will only be commenced where there is sufficient admissible and reliable evidence to provide a ‘realistic prospect of conviction’. Cases which do not pass this ‘evidential test’ must not go ahead no matter how serious or pressing the public interest may be.

4.5 The second stage involves giving consideration to all of the relevant public interest factors that exist should the case pass the evidential test. A prosecution should not normally take place where there are public interest factors tending against prosecution which clearly outweigh those tending in favour or if it appears more appropriate in all of
the circumstances of the case to seek to divert the individual from prosecution (see below).

4.6 The Registrar must ensure that he/she does not allow a prosecution to start or continue where to do so would be seen by the courts as oppressive or unfair so as to amount to an abuse of the process of the court.

4.7 Review is a continuing process and the Registrar (or the prosecuting lawyer having conduct of the prosecution on the Registrar’s behalf) must take account of any change in circumstances that occurs as the case develops.

4.8 When making decisions on prosecution the Registrar should, where appropriate, take into account the consequences for the victim(s) and any views expressed by the victim(s) and any other party that the Registrar considers necessary and appropriate to consult. However, these must be considered in relation to the wider public interest and the stated objective of the GPhC to protect, promote and maintain the health, safety and well-being of members of the public, and in particular of those members of the public who use or need the services of registrants, or the services provided at a registered pharmacy.

4.9 Should it appear appropriate, in all of the circumstances of the case, to seek to divert the individual from prosecution then consideration should be given, where it is possible to do so, to the following possible alternatives:

- Taking no further action
- Referral into the GPhC Fitness to Practise procedures
- Administrative action, for example, letter of advice etc.

4.10 In addition to the factors set out in the Code for Crown Prosecutors the Registrar should have regard to any other aggravating factors specific to the safe and effective practice of pharmacy. This may include (but not limited to):

- There is evidence that the individual's conduct or performance caused moderate or severe harm or death, which could and should have been avoided.
- There is evidence that the individual deliberately attempted to cause harm to patients and the public or others.
- There is evidence that the individual was reckless with the safety and wellbeing of others.
- There is evidence that the individual put their own interests, or those of a third party, before those of patients and/or the public.
- There is evidence that the individual culpably failed to act when necessary in order to protect the safety of patients and/or the public.
- There is evidence that the individual failed to respect the human rights of patients and/or the public, or demonstrated in their behaviour attitudes which are incompatible with registration as a pharmacy professional.
- There is evidence that the individual failed to maintain appropriate professional boundaries in their relationship with patients and/or others.

- There is evidence that the individual damaged or put at significant risk the best interests of patients by failing to communicate appropriately with patients or others.

- There is evidence that the individual practised outside of their current competence.

- There is evidence that the individual failed to maintain their knowledge and skills in a field relevant to their practice.

- There is evidence of a course of conduct, which is likely to undermine public confidence in the profession generally or put patient safety at risk, if not challenged by the regulatory body.

- There is evidence that the individual behaved dishonestly.

- There is evidence of behaviour on the part of the individual which is likely to undermine public confidence in the profession generally, if not challenged by the regulatory body.

- There is evidence that a registered pharmacist/pharmacy technician has practised in a way that was systemically unsafe, or, has allowed or encouraged others to do so, where he or she has responsibilities for ensuring a safe system of working.

- There is evidence of adverse physical or mental health which impairs a registered pharmacist/pharmacy technician’s ability to practise safely or effectively.

4.11 The GPhC does not have the power to arrest and/or charge individuals and nor is the GPhC a ‘public prosecutor’ as defined in section 29 of the Criminal Justice Act 2003. Therefore, criminal prosecutions will be commenced by way of the laying of an information and summons as set out in section 1 of the Magistrates’ Courts Act 1980.

5. Sentencing

5.1 When acting as a prosecutor, the GPhC, has a duty to assist the court in relation to sentencing and in particular should, where possible, be in a position to provide the court will all relevant information relating to the facts of the case and the individual defendant’s personal circumstances, including (but not limited to) the following:

- The defendant's age, background, present circumstances and previous convictions

- All relevant aggravating and mitigating factors

- Any relevant statutory sentencing provisions and sentencing guidelines and/or guideline cases
- Ancillary orders, such as compensation
- The views of any victim through the Victim Personal Statement
- The impact of the offending on a community.

6. **General Principles**

6.1 As stated above, the stated objective of the GPhC is to protect, promote and maintain the health, safety and well-being of members of the public. The furtherance of this objective must be considered by the GPhC in any decision to institute criminal proceedings.

6.2 There may be occasions when investigations that are being carried out by the GPhC into allegations of ethical or other breaches that may amount to professional or regulatory misconduct may also reveal that the misconduct in question amounts to a crime in law. This does not mean however that all regulatory misconduct that is also a crime will automatically lead to the institution of criminal proceedings. The decision to prosecute is a serious step and one of the factors to be carefully considered by the Registrar is whether, given the powers available to the GPhC in its statutory fitness to practise regime set out in the Order, the institution of criminal proceedings is the appropriate enforcement mechanism in all of the circumstances of the case.

6.3 This policy is to be reviewed at regular intervals.

**Gerard McEvilly, Head of Legal Advice and Hearings Management**

Reference: [To be allocated when the policy is approved]
Effective date: [Insert date]
Review date: To be kept under continual review however formal review to take place within two years from effective date
Annex 1

Code for Crown Prosecutors

Section 4 - The Full Code Test

4.1 The Full Code Test has two stages: (i) the evidential stage; followed by (ii) the public interest stage.

4.2 In the vast majority of cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed. However, there will be cases where it is clear, prior to the collection and consideration of all the likely evidence, that the public interest does not require a prosecution. In these rare instances, prosecutors may decide that the case should not proceed further.

4.3 Prosecutors should only take such a decision when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. If prosecutors do not have sufficient information to take such a decision, the investigation should proceed and a decision taken later in accordance with the Full Code Test set out in this section.

4.4 Prosecutors must follow any guidance issued by the DPP to ensure that decisions in these cases are appropriate and correct.

The Evidential Stage

4.5 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

4.6 A realistic prospect of conviction is an objective test based solely upon the prosecutor’s assessment of the evidence and any information that he or she has about the defence that might be put forward by the suspect. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.

4.7 When deciding whether there is sufficient evidence to prosecute, prosecutors must consider whether the evidence can be used and whether it is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears. In particular, prosecutors will need to consider the following issues.

Can the evidence be used in court?
a) Is it likely that the evidence will be excluded by the court? There are legal rules that might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was obtained?

b) Is the evidence hearsay? If so, is the court likely to allow it to be presented under any of the exceptions which permit such evidence to be given in court?

c) Does the evidence relate to the bad character of the suspect? If so, is the court likely to allow it to be presented?

Is the evidence reliable?

d) What explanation has the suspect given? Is a court likely to find it credible in the light of the evidence as a whole? Does the evidence support an innocent explanation?

e) Is there evidence which might support or detract from the reliability of a confession? Is its reliability affected by factors such as the suspect’s level of understanding?

f) Is the identification of the suspect likely to be questioned? Is the evidence of his or her identity strong enough? Have the appropriate identification procedures been carried out? If not, why not? Will any failure to hold the appropriate identification procedures lead to the evidence of identification being excluded?

g) Are there concerns over the accuracy, reliability or credibility of the evidence of any witness?

h) Is there further evidence which the police or other investigators should reasonably be asked to find which may support or undermine the account of the witness?

i) Does any witness have any motive that may affect his or her attitude to the case?

j) Does any witness have a relevant previous conviction or out of-court disposal which may affect his or her credibility?

k) Is there any further evidence that could be obtained that would support the integrity of evidence already obtained?

4.8 Where it is considered that it would be helpful in assessing the reliability of a witness’ evidence or in better understanding complex evidence, an appropriately trained and authorised prosecutor should conduct a pre-trial interview with the witness in accordance with the relevant Code of Practice.

4.9 Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a realistic prospect of conviction.

The Public Interest Stage

4.10 In 1951, Sir Hartley Shawcross, who was then Attorney General, made the
classic statement on public interest: “[i]t 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”. He added that there should be a prosecution: “wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest” (House of Commons Debates, Volume 483, 29 January 1951). This approach has been endorsed by Attorneys General ever since.

4.11 Accordingly, where there is sufficient evidence to justify a prosecution or to offer an out-of-court disposal, prosecutors must go on to consider whether a prosecution is required in the public interest.

4.12 A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal (see section 7). The more serious the offence or the offender’s record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest.

4.13 Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and for those factors to be put to the court for consideration when sentence is passed.

4.14 The absence of a factor does not necessarily mean that it should be taken as a factor tending in the opposite direction. For example, just because the offence was not “carried out by a group” does not transform the “factor tending in favour of a prosecution” into a “factor tending against prosecution”.

4.15 Some common public interest factors which should be considered when deciding on the most appropriate course of action to take are listed below. The following lists of public interest factors are not exhaustive and each case must be considered on its own facts and on its own merits.

Some common public interest factors tending in favour of prosecution

4.16 A prosecution is more likely to be required if:

a) a conviction is likely to result in a significant sentence;
b) a conviction is likely to result in an order of the court in excess of that which a prosecutor is able to secure through a conditional caution;
c) the offence involved the use of a weapon or the threat of violence;
d) the offence was committed against a person serving the public (for example, a member of the emergency services; a police or prison officer; a health or social welfare professional; or a provider of public transport);
e) the offence was premeditated;
f) the offence was carried out by a group;
g) the offence was committed in the presence of, or in close proximity to, a
h) the offence was motivated by any form of discrimination against the victim’s ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics;

i) the offence was committed in order to facilitate more serious offending;

j) the victim of the offence was in a vulnerable situation and the suspect took advantage of this;

k) there was an element of corruption of the victim in the way the offence was committed;

l) there was a marked difference in the ages of the suspect and the victim and the suspect took advantage of this;

m) there was a marked difference in the levels of understanding of the suspect and the victim and the suspect took advantage of this;

n) the suspect was in a position of authority or trust and he or she took advantage of this;

o) the suspect was a ringleader or an organiser of the offence;

p) the suspect’s previous convictions or the previous out-of-court disposals which he or she has received are relevant to the present offence;

q) the suspect is alleged to have committed the offence in breach of an order of the court;

r) a prosecution would have a significant positive impact on maintaining community confidence;

s) there are grounds for believing that the offence is likely to be continued or repeated.

Some common public interest factors tending against prosecution

4.17 A prosecution is less likely to be required if:

a) the court is likely to impose a nominal penalty;

b) the seriousness and the consequences of the offending can be appropriately dealt with by an out-of-court disposal which the suspect accepts and with which he or she complies (see section 7);

c) the suspect has been subject to any appropriate regulatory proceedings, or any punitive or relevant civil penalty which remains in place or which has been satisfactorily discharged, which adequately addresses the seriousness of the offending and any breach of trust involved;

d) the offence was committed as a result of a genuine mistake or misunderstanding;

e) the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement;

f) there has been a long delay between the offence taking place and the date of the trial, unless:

- the offence is serious;
- the delay has been caused wholly or in part by the suspect;
- the offence has only recently come to light;
- the complexity of the offence has meant that there has been a long investigation; or
- new investigative techniques have been used to re-examine previously unsolved crimes and, as a result, a suspect has been identified.

g) a prosecution is likely to have an adverse effect on the victim’s physical or mental health, always bearing in mind the seriousness of the offence and the
views of the victim about the effect of a prosecution on his or her physical or mental health;
h) the suspect played a minor role in the commission of the offence;
i) the suspect has put right the loss or harm that was caused (but a suspect must not avoid prosecution or an out-of-court disposal solely because he or she pays compensation or repays the sum of money he or she unlawfully obtained);
j) the suspect is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. Prosecutors apply Home Office guidelines about how to deal with mentally disordered offenders and must balance a suspect's mental or physical ill health with the need to safeguard the public or those providing care services to such persons;
k) a prosecution may require details to be made public that could harm sources of information, international relations or national security.

The views of victims or their families

4.18 In deciding whether a prosecution is required in the public interest, prosecutors should take into account any views expressed by the victim regarding the impact that the offence has had. In appropriate cases, for example, a case of homicide or where the victim is a child or an adult who lacks capacity as defined by the Mental Capacity Act 2005, prosecutors should take into account any views expressed by the victim's family.

4.19 However, the prosecution service does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest.

4.20 Where prosecutors have a responsibility to explain their decision to the victim, for example, when they stop a case or substantially alter the charge in a case, they must comply with the Code of Practice for Victims of Crime and all relevant CPS Guidance. Prosecutors must follow any agreed procedures; including abiding by any time period within which such decisions should be notified to the victim.