

Applying appropriate sanctions consistently

Policy statement – April 2013

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Tackling fraud and managing security

Contents

- 1 Introduction 1
- 2 The NHS Protect approach to pursuing sanctions 1
- 3 The criminal route 2
 - 3.1 Criminal investigations 2
 - 3.2 Prosecution 2
 - 3.3 The Proceeds of Crime Act 2002 2
 - 3.4 Compensation upon conviction 3
- 4 The civil route..... 3
 - 4.1 Civil proceedings..... 3
 - 4.2 Interim orders..... 3
 - 4.3 Seeking assistance with a civil claim 4
- 5 The disciplinary and regulatory routes..... 4
 - 5.1 Disciplinary proceedings 4
 - 5.2 Suspension or removal from professional registers 4
 - 5.3 Suspension or removal from NHS lists 5
- Appendix 1: Case example..... 6

1 Introduction

Appropriate sanctions should always be sought in response to financial crime perpetrated against the NHS. The range of available sanctions which may be pursued by the relevant decision makers includes:

- criminal prosecution (potentially resulting in fine, imprisonment, community penalty, confiscation and/or compensation order) or out-of-court disposal
- civil action, including action to preserve assets and recover losses
- disciplinary action by the employing body
- regulatory action by a relevant regulatory body.

Each case must be considered individually on its own facts and merits; however, applying a consistent and thorough approach in all cases will ensure that:

- the most effective investigations are undertaken, including the gathering and assessment of all relevant material which may form evidence of fraud, bribery, corruption, misconduct and/or unfitness to practise
- the most appropriate sanction or combination of sanctions is sought where fraud, bribery, corruption or related misconduct is identified.

This policy statement has been produced in consultation with the Department of Health (DH) Legal Services and the Crown Prosecution Service (CPS).

2 The NHS Protect approach to pursuing sanctions

Where fraud, bribery or corruption has taken place within or against the NHS, the full range of available sanctions – criminal, civil, disciplinary and/or regulatory – should be considered at the earliest opportunity, and any or all of these may be pursued where and when appropriate. Consistent use of the appropriate combination of investigative processes in each case ultimately contributes to the deterrence and prevention of fraud and can also help to enable the recovery of NHS funds and assets. A case example which demonstrates this approach is found at Appendix 1.

While multiple sanction processes may be undertaken in relation to the same or related incidents, the purposes, rules of evidence, standards of proof and outcomes for each type of process differ significantly. Because of the higher standard of proof and strict legal rules that govern criminal investigations, where the decision is made to proceed with a criminal process this should normally determine the actions and timing of other related investigations undertaken by an employer or regulatory body, in order to avoid prejudice.

However, there is no general rule that the criminal process should take precedence over other processes relating to alleged fraud, bribery or corruption. In practice, public protection is paramount. For example, where there is a compelling public interest in suspending or removing an individual from employment, other proceedings may need to take precedence. This approach requires liaison between those undertaking the various investigations, and certain information may be shared where lawful and at the appropriate time.

Refer to *'Parallel criminal and disciplinary investigations – Guidance for Local Counter Fraud Specialists'* for further information.

3 The criminal route

NHS Protect and health bodies may conduct a criminal investigation with a view to submitting a case to the CPS for a decision regarding prosecution for any number of reasons, for example:

- The case is serious and/or extensive.
- If a prosecution took place it would help to challenge beliefs about fraud, bribery and corruption and how and when they can occur.
- If a prosecution took place it would help to prevent or deter financial crime.
- If a prosecution took place it would demonstrate to potential offenders and the public that those who commit crimes against the NHS will be held to account.

However, this list is non-exhaustive; NHS Protect and health bodies reserve complete discretion to conduct a criminal investigation in any case and to carry out investigations across a range of offences.

3.1 Criminal investigations

Criminal investigations must adhere to all applicable legislation and codes of practice. In very serious and complex cases, or where a financial investigation is conducted, the investigator should work closely with the prosecutor from the start of the investigation.

Following an investigation where there is evidence of fraud or corruption, the investigator, usually in conjunction with the health body's Director of Finance (or equivalent), should make an assessment of the investigation, taking into account the evidence available and the seriousness of the offence(s), and decide whether to submit the case to the Area Anti Fraud Specialist (AAFS) or other NHS Protect operational contact. If the decision is made to submit it for consideration, the AAFS or other NHS Protect operational contact will technically assess the case file to decide whether it is suitable for submission to the CPS for a decision on whether a prosecution should take place.

Further operational guidance and advice for investigators can be found in the NHS anti fraud manual. Interaction and cooperation between NHS Protect and the CPS takes place within the framework of the Memorandum of Understanding agreed in August 2012.

3.2 Prosecution

The CPS is an independent prosecutor and will make charging decisions in respect of all cases referred to it in accordance with the **Code for Crown Prosecutors**.

3.3 The Proceeds of Crime Act 2002

The Proceeds of Crime Act 2002 (POCA) enables the confiscation of property accumulated through crime.

Financial investigation under POCA should be considered early on during an investigation, where there is evidence of a criminal offence and where recovery of losses is a primary consideration. It can be used to determine whether a person has benefited from his/her criminal conduct, as well as the extent and whereabouts of that benefit. NHS Protect has a team of Accredited Financial Investigators (AFIs) who can apply for orders giving them access to a wide range of financial and other information from third parties, to help them trace and locate the proceeds of crime.

The CPS must be consulted by the investigator at the start of every POCA financial investigation. This allows the prosecutor to consider making an application to the court for a **restraint order**, which has the effect of freezing property, anywhere in the world, which may be liable to confiscation following a conviction and the making of a confiscation order. Such an order may be made against both the person charged or under investigation and any other person holding realisable property.

In accordance with POCA, the court has a duty to make a confiscation order under certain circumstances, listed in section 6 of the Act. However it may exercise discretion about whether to do so if it believes that any victim of the criminal conduct has at any time started or intends to start proceedings against a defendant in respect of loss, injury or damage sustained in connection with the conduct. Therefore the prosecutor must likewise be informed of the potential for or intention to pursue civil proceedings, as this may influence the decision to pursue confiscation or compensation upon conviction (see section 3.4 below).

3.4 Compensation upon conviction

Financial recovery following a conviction may be achieved via a compensation order with regard to the loss caused to the victim by the offence(s) charged and/or any other offences taken into consideration by the court in determining sentence. A compensation order can be made in addition to, or instead of, any other penalty.

If the health body wishes to recover its losses where the court makes an order for confiscation under POCA, an application for compensation may be made to the court dealing with the confiscation proceedings. Where the Crown Court makes both a confiscation order and compensation order against the same person in the same proceedings and believes the person has insufficient means to satisfy both orders in full, the court must direct the amount of compensation to be paid out of any sums recovered via confiscation.

4 The civil route

4.1 Civil proceedings

A civil claim with the objective of financial recovery can be brought where financial redress via the criminal route is not thought to be appropriate, or where a health body was not (fully) compensated following a criminal conviction. If successful the claimant is entitled to seek enforcement by various means, including the forced transfer of assets, the forced sale of property to realise capital, or insolvency proceedings.

Where there is an ongoing criminal investigation or prosecution this will normally determine when civil proceedings would best be commenced. The health body should ensure that solicitors acting on its behalf to pursue a civil claim are informed of any criminal investigation or proceedings prior to commencing a claim.

It should be noted that civil action is not the only option for a health body seeking financial recovery outside of a criminal case. Health bodies may find that mediation or voluntary repayment is a more effective means in some cases.

4.2 Interim orders

The claimant must be ready to commence a civil claim (or very near this stage) at the time of applying for interim orders, such as the ones described below:

- **Freezing injunctions** preserve the proceeds of a fraud at the outset of a civil claim, where there is a real risk that the suspect might try to hide or dispose of their assets.
- **Search orders** permit the claimant's agents to enter the defendant's premises to search for and secure evidence and property, particularly where there is a real likelihood that material will disappear otherwise.

Obtaining freezing injunctions, search orders, and/or other interim orders 'without notice' and 'in private' – i.e., by applying to the court behind closed doors, without the knowledge of the intended defendant – can help prevent a defendant from taking pre-emptive steps to frustrate the claimant's efforts to secure information or assets.

4.3 Seeking assistance with a civil claim

NHS Protect enters into agreements with law firms providing civil recovery services in order to support NHS bodies in seeking to recover NHS funds lost to fraud and corruption. This includes advice and investigation support in an area previously considered high risk by public bodies due to costs.

For accredited investigators, details of any such scheme and contact details can be found on the **NHS Protect fraud extranet site** under Documents > Operations Documents.

5 The disciplinary and regulatory routes

5.1 Disciplinary proceedings

Disciplinary investigations and criminal investigations must be conducted separately and by different individuals. These two processes have different purposes, rules of evidence, standards of proof and outcomes; and it would not be appropriate for one process to cover both. While in some cases the disciplinary allegations could involve criminal acts, it is more likely that they would be related to issues such as a breach of trust. In any case, conducting separate processes helps to ensure the integrity of the individual investigations in relation to the way evidence has been gathered.

Health bodies must have appropriate procedures in place with regard to undertaking disciplinary investigations. The Local Counter Fraud Specialist (LCFS) remit should cover criminal investigations only, and NHS Protect **does not endorse** the use of LCFS provision for carrying out disciplinary investigations at a health body.

Where both criminal and disciplinary investigations are conducted regarding the same incident, close and supportive liaison between the two is needed. See the guidance document '*Parallel criminal and disciplinary investigations – Guidance for Local Counter Fraud Specialists*' for further information.

5.2 Suspension or removal from professional registers

The General Medical Council (GMC), General Dental Council (GDC), General Optical Council (GOC), Nursing and Midwifery Council (NMC), General Pharmaceutical Council (GPhC), Health Professions Council (HPC) and other regulators have statutory powers to place conditions on, suspend, or remove the registration of professionals whose fitness to practise has been impaired by virtue of a criminal conviction, caution or serious professional misconduct. If a professional is removed from the professional register, or while a professional is suspended, he/she will not be able to provide services to any health body or to practise privately.

Where the investigator becomes aware during an investigation that clear evidence exists of a healthcare professional's involvement in fraud or corruption, there is likely to be a strong public interest in informing the appropriate regulatory body who can then consider whether Fitness to Practise procedures should be invoked. This should be done at the earliest opportunity, particularly where there are patient safety concerns and/or a significant risk to public funds.

The NHS Protect guidance document '*Parallel criminal and disciplinary investigations – Guidance for Local Counter Fraud Specialists*' contains advice on the timing of referrals and sharing of information with regulatory bodies. In addition, NHS Protect and the GMC have agreed a **Memorandum of Understanding** which outlines arrangements for information sharing and coordination between the two organisations.

5.3 Suspension or removal from NHS lists

NHS England may suspend or remove doctors, dentists, and ophthalmic medical practitioners from performers lists comprising those who may provide NHS services. Where clear evidence exists that a healthcare professional has been involved in fraud or corruption, there is likely to be a strong public interest in informing NHS England to enable it to undertake enquiries regarding the allegations and to take action where appropriate. In making its decision, NHS England may consider whether the instances of fraud in question, as well as any current or past investigations relating to the professional, justify such action. The duty to protect patients is a major factor in deciding what action is necessary.

Appendix 1: Case example

Prison dentist receives triple sanction for 6-figure fraud

Following an investigation by NHS Protect, Mr A., a former prison dentist, was found to have committed high-value fraud against the NHS. Mr A had failed to declare he was already being paid by private healthcare companies for his work providing dental care for inmates at a privately run prison when he secured an NHS contract to deliver the same services.

The dentist went on to claim many payments from the local PCT for treating inmates at the prison. Due to new regulations, Mr A had been required to go on the performers list of the PCT in 2004 and began receiving payments from NHS Dental Services, on behalf of that PCT, in 2005. In early 2006, the dentist persuaded the PCT to enhance the value of his annual contract. Between December 2006 and December 2008, he received £333,000 in payments from the NHS and £277,000 from his private employer.

NHS Protect conducted a criminal investigation and pursued a criminal prosecution against Mr A for over 30 counts of dishonestly retaining a wrongful credit under the Theft Act 1968, and for the offence of fraud by false representation under the Fraud Act 2006. The indictment reflected a total loss to public funds of approximately £405,000, and the offences were perpetrated against three PCTs.

The decision was made at an early stage to pursue financial recovery through civil proceedings, rather than seeking a compensation order from the Court as part of the criminal case. Lawyers were instructed before the criminal charges were brought, and worked with NHS Protect to prepare and coordinate a civil claim.

The possibility of obtaining a freezing injunction against Mr A, securing his assets, was also considered at an early stage, but discounted in light of the period of time for which Mr A had been aware of the case against him, which a Court would likely hold to mean that the dissipation of assets would have already occurred.

The lawyers served a letter before action on the solicitors to Mr A before the trial, seeking repayment of more than £530,000 fraudulently received over the 2004-09 period, reflecting a wider claim than the criminal case, and based on breach of contract rather than fraud.

Having at first pleaded not guilty to the charges, Mr A changed his plea to guilty in relation to 27 of them – worth £307,000 in total – on the first day of trial. In late 2010 at Liverpool Crown Court he was sentenced to 30 months' imprisonment.

Negotiations on settlement of the civil claim then began in earnest, assisted by the extensive financial information obtained by NHS Protect during the course of the criminal investigation. The lawyers conducted further investigations regarding Mr A's assets and obtained a Court Order requiring formal disclosure of the details of all his assets worth over £500. Mr A appeared to have relatively limited assets and owed significant sums in unpaid tax, and at one stage initiated an insolvency process. However, it was discovered through the Pensions Agency that Mr A could obtain a six-figure lump sum payment from his pension at that stage, and would continue to receive a generous annual pension thereafter.

Settlement was reached with Mr A on the basis of payment of the entirety of his maximum NHS pension lump sum, along with further payments, totalling £325,000. Mr A also consented to judgment being entered against him at Court on this basis, to reduce the risks to the PCTs of Mr A entering bankruptcy before the settlement sum was paid (as a Court judgment would rank more highly than a number of other creditors on bankruptcy). The settlement monies were safely received and distributed among the PCTs in question.

Furthermore, NHS Protect investigators referred Mr A's case to the General Dental Council (GDC) to consider in the context of professional registration. In 2010 the GDC imposed an interim order of suspension of Mr A's registration, and a GDC Professional Conduct Committee hearing concluded in 2011 that Mr A's actions had breached fundamental tenets of the profession, and that his fitness to practise had been impaired. Mr A's actions and criminal convictions were considered so serious that severe action was necessary to maintain the reputation of the dental profession and public confidence in it. The committee made an immediate order of suspension and Mr A was subsequently removed from the Dentists' Register.