



Criminal Prosecutions for Regulators **Selva Ramasamy, QEB Hollis Whiteman**

How might this issue arise for a regulator?

The circumstances in which a regulator might consider a criminal prosecution (whether by bringing proceedings itself or by involving an external law enforcement agency) are wide and varied. They can arise at any stage of regulatory proceedings, and include the following:

- Inquiries may reveal offences under the regulator's own statutory provisions (e.g. practising while unregistered)
- Initial investigation of a referral may disclose that the allegations are sufficiently serious to justify criminal proceedings
- Evidence might emerge during a regulatory hearing that discloses prima facie criminal behaviour
- Law enforcement agencies (most commonly the police) might have been the initial point of complaint before choosing to refer the matter to the regulator rather than bringing criminal proceedings themselves

Why might a regulator consider a criminal prosecution?

There are distinct imperatives behind regulatory and criminal proceedings, which will inform which is most appropriate to individual cases:

Criminal

The purpose of the criminal justice system is 'to deliver justice for all, by convicting and punishing the guilty and helping them to stop offending, while protecting the innocent.'¹ The criminal system

¹ Criminal Justice System website

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is adversarial, with a high standard of proof (beyond reasonable doubt). Sanctions can be punitive, and range from financial penalties to custodial sentences.

Regulatory

The purposes of regulatory proceedings include public protection, competence, performance, quality assurance, and setting standards. 'It is a central function of the GMC, through the Fitness to Practise panel, to promote the interests of patients and to protect them by ensuring a good standard in the practice of medicine by doctors who are fit to practise.'² Though adversarial in form, they are inquisitorial in nature. Sanctions are designed to protect the public and not to punish the registrant. The standard of proof is the civil standard (the balance of probabilities).

Criminal proceedings may be appropriate where public protection can only be served by the invocation of such punitive sanctions as are unavailable to regulators.

The regulator may decide that such serious harm has been done (or is a possible future risk) that regulatory proceedings cannot adequately protect the public. Where a regulator is dealing with past conduct, its seriousness may be such that punitive sanctions are justified.

A criminal prosecution (whether by the regulator itself or via a referral of appropriate cases to the police etc.) will assist regulators in carrying out their duty to maintain public confidence in their sectors by demonstrating that they are prepared to take robust action where necessary.

Criminal sanctions carry with them a greater deterrent effect than regulatory sanctions.

Criminal sanctions could be more appropriate to remedy the harm caused, e.g. by means of compensation orders (although in healthcare cases, civil proceedings may often be more appropriate as a means of redress) or disqualification from certain corporate functions.

A criminal conviction can often be determinative of an issue in regulatory proceedings.

Advantages and disadvantages of criminal proceedings

Regulators are advised to consider the advantages and disadvantages of criminal proceedings:

Advantages

- If referred to an external prosecutor: Police and State bodies have greater powers to gather evidence (e.g. powers of arrest, search, interview under caution) and cost is borne by the State
- Any conviction obtained can be pleaded in regulatory proceedings

² Indicative Sanctions Guidance, General Medical Council, April 2009

- Issues will have been ventilated once in the criminal proceedings and be more clearly identified for the regulatory proceedings
- Defence evidence will have been adduced
- Disclosure issues may have been resolved in the criminal proceedings

Disadvantages

- If referred to an external prosecutor: Lack of control over the subsequent nature and direction of the investigation; State authorities may lack requisite experience and expertise; State authorities may have different priorities and goals in respect of a prosecution
- Criminal proceedings may take considerable time (and the defendant may be suspended from practising for the duration of those proceedings)
- Defence are given a preview of the issues to be raised in subsequent regulatory proceedings
- If there are to be subsequent regulatory proceedings, witnesses may be less co-operative if they have to participate in two sets of proceedings

Selection of prosecutor and instituting proceedings

Private prosecution

It is possible for a regulator to bring a private prosecution. The regulator retains control of the prosecution, and can carry it out in the way which best serves its regulatory function. However, private prosecutions can be costly. Moreover, should the prosecution fail, the regulator may be ordered to pay the registrant's costs.

For regulators, the prosecution process would be commenced by means of an 'information' laid at a magistrates' court. Thereafter the court issues a summons (or an arrest warrant) requiring the accused to attend before it.

Rule 7 of the Criminal Procedure Rules sets out the necessary procedure and provides a fairly straightforward prescribed form.

Beyond the general statement in r. 7 that informations and written charges should avoid the use of technical terms and give reasonable information about the nature of the charge, there is little guidance on how they should be drafted. However, reference to a particular statutory provision may cure an apparent defect by making plain what might otherwise be ambiguous (*Karpinski v City of*

Westminster [1993] Crim LR 606, followed in *DPP v Short* (2002) 166 JP 474).

If the information or written charge, as originally drafted, gives insufficient particulars, application for further particulars may be made at any time after the charge has been preferred (*Aylesbury Justices, ex parte Wisbey* [1965] 1 WLR 339 at p. 345).

An information should describe the offence in ordinary language avoiding as far as possible the use of technical language and should give such particulars as may be necessary to provide reasonable information about the nature of the charge. It is not necessary to state all the elements of the offence or negative any matter upon which the accused may rely. Where the offence charged is statutory, the description of the offence must contain a reference to the section of the Act, or the rule, order, regulation, byelaw or other instrument creating the offence. Where a particular act constitutes the offence, it is enough to describe it in the words of the statute, but where particular means to effect the object are essential to the description of the offence, they should be stated; for example the nature of an alleged deception, or unlawful purpose, or document falsified, etc. Where a statutory provision has been substituted by an amending statute, the words 'as substituted by' should be used instead of the words 'as amended'.

The form of information should state the name and address of the party charged and of the person laying the information, and the offence, together with when and where it was committed, which must be within the court's jurisdiction. If the informant cannot name the precise day, it will be sufficient to allege the offence to have been committed between stated days.

The information may be laid either by the prosecutor in person, or by counsel or a solicitor on his behalf, or by any other person authorised to do so (Criminal Procedure Rules, r. 7.1(1)). However, an information may not be laid on behalf of an unincorporated association, since the definition of 'person' in the Interpretation Act 1978 as including a 'body of persons corporate or unincorporate' was not intended to apply to the laying of informations (*Rubin v DPP* [1990] 2 QB 80). **It follows that an information must be laid by a named, actual person and must disclose the identity of that person.**

However, the appeal in *Rubin* was dismissed because, although the information was defective in that the informant purported to be 'Thames Valley Police' (such a prosecution would now be commenced by way of written charge and requisition), the appellant could easily have ascertained the identity of the officer who had laid the information. In *Ealing Justices, ex parte Dixon* [1990] 2 QB 91, Woolf LJ said that he had reservations as to the reasoning which had underpinned the conclusion reached by Watkins LJ in *Rubin*, that a prosecution has to be by an individual rather than a corporate person. Nonetheless, his Lordship said (at p. 101) that he would 'regard it as preferable for an individual to be the informant albeit that he is acting on behalf of a body corporate'.

When an information has been laid, a justice or the justices' clerk must apply his mind to the information, and go through the judicial exercise of deciding whether or not a summons or a warrant ought to be issued by him. His initial concern will be to see that the information discloses an offence known to law, that he has territorial jurisdiction to act, that the date of the alleged

offence is within any limitation of time, and that any necessary consents to prosecution have been obtained. When considering whether to issue a summons, the justice or justices' clerk has jurisdiction to refuse to issue a summons if to issue a summons would be vexatious and improper even if there were evidence of the offence. A warrant is not to be issued initially for a minor offence, nor for any offence where a summons would be equally effectual, except in cases of a very serious nature. If a warrant is to be issued, the information must be in writing.

Care must be taken to ensure that prosecution of the offence is not time barred (whether by virtue of the general time bar for summary only offences created by s.127 of the Magistrates Courts Act 1980 or by virtue of any specific time bar under the relevant statute)

Costs of the prosecution: a court may make an order for payment of such costs as it considers just and reasonable by a convicted defendant to a prosecutor (s.18 of the Prosecution of Offences Act 1985), or for payment out of central funds of such sum as it considers reasonably sufficient to compensate the prosecutor for any expenses incurred in the proceedings (s.17 of that Act).

If a private prosecution is brought, it is important to note that the Director of Public Prosecutions has the power to take over any private prosecution and in appropriate circumstances, to discontinue the case (see s.6 of the Prosecution of Offences Act 1985). Such a step might be taken if for example the proceedings would be contrary to the public interest.

External prosecutor

The alternative is to involve law enforcement agencies, principally the police and Crown Prosecution Service. The Crown Prosecution Service is responsible for charging criminal offences, and will apply two-stage test before doing so: an evidential test and a public interest test.

If the CPS prosecutes, the regulator will lose control of the case. The CPS has an ongoing duty to review prosecutions, and cases can be discontinued after a prosecution has begun.

Selection of defendants and mode of trial

Potential Defendants

Most commonly, the criminal proceedings will be directed against the individual registrant.

In some cases, it may be necessary to consider the liability of the corporate entity through which the registrant practises. It is possible that the entity itself is liable. It seems to be generally accepted that a company will only be identified with an act done by one of its officers within the scope of his office.

Mode of trial

All offences start off at the Magistrates Court. Summary offences never leave there; either way offences may be tried in either the Magistrates Court or the Crown Court; indictable only offences must be sent to the Crown Court.

Unless limited by the statute creating the offence, the maximum sentence of imprisonment for a summary offence is 6 months imprisonment, or 12 months if the Magistrates are sentencing a defendant for more than one triable either way offence. Save where it is specified in the statute creating the offence, there is no limit on the sentencing powers of the Crown Court.

It is fair to say that cases tried in the Crown Court are likely to be more protracted and costly, not least because a jury is likely to be involved.

Criminal offences that may arise in a regulatory context

Set out below is a (non-exhaustive) list of possible criminal offences which may be of interest to regulators.

Specific offences under the regulator's own statutory provisions

Examples being:

Medical Act 1983 offence

Section 49 creates an offence of pretending to be registered. The offence turns on an individual wilfully and falsely pretending to be, or taking the title of, doctor etc. implying that he is registered under the Medical Act or recognised by law as a doctor. The offence is summary only, with the maximum penalty being a level 5 fine. Proceedings must be commenced within 6 months of the time the offence was committed or when the matter of complaint arose.

Dentists Act 1984 offences

Section 38 creates the summary only offence of practising or holding oneself out as a dentist (by implication or otherwise) by a person not registered with the General Dental Council. The time limit for prosecutions under section 38 is six months beginning with the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to the prosecutor's knowledge. No proceedings can be brought more than two years after the offence was allegedly committed.

Section 39 makes it a summary offence for a layman to use practitioner's titles or imply that they are registrants.

Section 41 makes it a summary offence for an individual who is not a dentist to carry on the business of dentistry.

Section 43 makes it a summary offence for a body corporate to carry on business of dentistry at a time when the majority of its directors are not registrants.

Assault

If treatment is performed without the consent of the patient it could constitute an assault (*Re: JT (Adult: Refusal of Medical Treatment)* [1998] 1 F.L.R. 48). Where a patient does consent, they must know what they are consenting to in order for that consent to be effective: *Burrell v. Harmer* [1967] Crim. LR 169. However, where information is withheld which does not impact upon the essential quality of the nature provided, the withholding of such information will not necessarily negate the consent: *Richardson* [1999] QB 444.

The assault charged will turn on the level of injury caused. The lowest levels of assault will be charged as common assault contrary to section 39 of the Criminal Justice Act 1988, and tried summarily. Where the level of injury is greater, a charge might be brought under the Offences Against The Person Act 1861, for:

- Assault occasioning actual bodily harm, contrary to section 47. The offence is triable either way.
- Wounding or inflicting grievous bodily harm, contrary to section 20. The offence is triable either way.
- Wounding or inflicting grievous bodily harm with intent, contrary to section 18. The offence is triable on indictment only.

Fraud

Thought should be given to such charges if there has been a dishonest deception.

If it occurred before 2006, for example a prosecution for obtaining property by deception under section 15 of the Theft Act 1968 may be possible.

If the alleged offence occurred after 2006, it will be charged under the Fraud Act 2006.

The Fraud Act 2006 abolishes all the deception offences in the Theft Acts 1968 and 1978 (see Schedule 1) and replaces them with three new basic fraud offences:

- fraud by false representation s.2;
- fraud by failing to disclose information s.3; and

- fraud by abuse of position s.4.

There are also preliminary offences of possessing/ making equipment to commit frauds (ss. 6, 7); a new offence of fraudulent trading other than by companies (s.9) and obtaining services dishonestly (s.11 – which replaces obtaining services by deception). The major change is a new focus on the Defendant's representations, rather than the actions or beliefs of the victim. Fraud is now proven by the conduct and intent of the Defendant rather than the result of his actions on the victim. Generally speaking, causation does not arise and there is no need to prove a result of any kind, or that the intended victim believed the representation, or acted on it, or that the Defendant succeeded in making any gain or causing loss. Unsuccessful attempts may still be a completed offence.

Health and Safety offences

Section 33 of the Health and Safety at Work Act 1974 creates an offence of failing to discharge the various duties created by section 2 to 7 of the Act. The most common duties invoked for prosecution are:

- o An employer's duty to conduct his undertaking in a way that ensures so far as reasonably practicable that non-employees are not exposed to risks to health and safety – section 3
- o An employee's duty to take reasonable care for the health and safety of himself and other persons who may be affected by his acts or omissions at work – section 7

Offences under the 1974 Act can only be prosecuted by a Health and Safety Executive Inspector, the Environment Agency or with the consent of the Director of Public Prosecutions. A prosecution may be commenced at any time within six months from the date on which there comes to the knowledge of a responsible enforcing authority evidence sufficient in the opinion of that authority to justify a prosecution.

Possible sanctions on conviction

Punishments for the offences outlined above range from fines to imprisonment. In addition, the court has the power to impose a range of orders, such as:

Confiscation Order - Made in the Crown Court under the Proceeds of Crime Act 2002. Monies confiscated are paid to the state and not to victims. Offences tried summarily can, on application by the prosecutor, be sent to the Crown Court for the imposition of a Confiscation Order.

Deprivation Order - Made under section 143 of Powers of Criminal Court (Sentencing) Act 2000, they can be used to deprive practitioners of equipment, which is surrendered to the police.

Compensation Order – Made under section 130 of the PCC(S)A 2000. The sums awarded are unlikely to be high, but monies are paid to the victim.

Running criminal and regulatory proceedings in tandem

Regulatory hearings and criminal prosecutions can proceed in parallel: *Jefferson Ltd. v. Bhetcha* [1979] 1 W.L.R. 898. Indeed, case law suggests that parallel criminal and regulatory proceedings are rarely prejudicial to the extent that they justify a stay of the regulatory hearing:

'...it is only if there is a real risk that the investigation of misconduct will muddy the waters of justice...that the [regulator] should in my judgement refrain from investigating a case for misconduct...' per Lord Donaldson MR in *R v Solicitors Disciplinary Tribunal ex parte Gallagher* (1987) 127 N.L.J. 171

The High Court has set out the relevant principles for a court to consider when an application is made to stay regulatory proceedings during a criminal prosecution (by Dyson J in *R v Executive Council of the Joint Disciplinary Scheme ex parte Hipps* [1996] C.L.Y. 5):

- The court was not concerned with the notion of Wednesbury unreasonableness review but had to exercise an original jurisdiction and decide whether to grant a stay
- Such jurisdiction should not be over used
- A stay had to be refused unless a real risk of serious prejudice could be demonstrated by the party seeking the stay
- In a case where the court decided that there was a real risk of prejudice, the risk had to be weighed against other considerations including the strong public interest in pursuing the disciplinary process
- When balancing the considerations, much weight would be given to the opinion of the relevant disciplinary body as to the factors militating against the stay
- The facts of similar cases are usually only of limited assistance - each case has to be considered on its own facts

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