



**Business Services Authority**

**Counter Fraud and  
Security Management Service**



# Memorandum of Understanding

between the NHS Counter Fraud and Security  
Management Service and the Crown Prosecution Service

## Protecting your NHS

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## 1. Purpose

- 1.1 This memorandum of understanding ('memorandum') has been agreed between the Crown Prosecution Service ('CPS') and the NHS Security Management Service ('NHS SMS') to ensure the effective prosecution of cases involving violence and abuse (whether physical, verbal or sexual, and including assaults which are religiously or racially motivated) against any member of 'NHS staff' (defined in Secretary of State Directions made under the National Health Service Act 1977 as 'any person who is employed by or engaged to provide services to an NHS body').

## 2. Scope

- 2.1 This agreement will only cover investigations that are referred to the CPS by the police. The CPS will only review investigations by a third party if, at some point, the matter is handed over to the police who then refer it to the CPS. This does not restrict the ability of the Director of Public Prosecutions to take over a private prosecution under section 6(1) of the Prosecution of Offences Act 1985 (see paragraphs 5.5, 5.6 and 5.7 of the memorandum).
- 2.2 The term 'NHS staff' refers to 'any person who is employed by or engaged to provide services to an NHS body' and who is the victim of an assault, public order offence or harassment whilst they are on duty. This will include those who provide voluntary services to the NHS.
- 2.3 This memorandum applies to **England** as the NHS SMS has responsibility for security and operational policy in England only. Guidance in this memorandum to Crown Prosecutors will also, however, apply in Wales.
- 2.4 This memorandum does not apply to incidents of fraud or corruption in the NHS.

## 3. Commencement and amendment

- 3.1 This agreement will take effect on **1 November 2006**.
- 3.2 This agreement may be amended as appropriate at any time if the parties to the memorandum agree. Any amendments should be agreed in writing. Any amendment must, however, be consistent with the nationally-agreed protocols and standards.

## 4. Nationally-agreed protocols and standards

- 4.1 The delivery of local arrangements within the framework of this memorandum will be consistent with the following protocols and standards:
- *Memorandum of Understanding between the Association of Chief Police Officers (ACPO) and the NHS Security Management Service (2006)*
  - *The Code for Crown Prosecutors (November 2004)*

- the Director of Public Prosecutions (DPP)'s *Guidance on Charging* (February 2007)
- the DPP's *Guidance on Conditional Cautioning* (October 2007)
- charging standards for relevant offences
- CPS policy statements, including the statement on racially and religiously aggravated crime and homophobic crime (July 2003)
- the Crown Prosecution Service's *Anti-Social Behaviour Guidance* (August 2006)
- *Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in Sentencing* (October 2005)
- CPS Public Policy Statement on the Delivery of Service to Victims (January 2008)
- the Farquharson guidelines on *The Roles and Responsibilities of the Prosecution Advocate*
- the *Bar/CPS Standard for Communication between Victim and Witnesses and the Prosecution Advocate* (February 2006)
- Secretary of State Directions, November 2003 (amended 2006) and March 2004 (amended 2006) for taking forward work to tackle violence and general security management issues
- the NHS SMS Legal Protection Unit's prosecution policy.

## 5. Local agreements, disputes and monitoring

- 5.1 This protocol should be implemented locally by a suitable service level agreement between the parties and any other organisations or bodies that the parties think appropriate.
- 5.2 Any disagreement over the workings of this protocol or local agreements will be referred to the agreed level of management for early and informal resolution, wherever possible.
- 5.3 The parties will, at an agreed interval, monitor the workings of this protocol and any local agreements with a view to improving the efficiency and effectiveness of local professional working arrangements.

## 6. Revision

- 6.1 As explained in paragraph 3.2, this memorandum may be amended at any time. Whether or not any amendments are made, it should be the subject of a thorough and detailed review by both parties by July 2009. The memorandum was subject to a detailed review in November 2007.
- 6.2 Date of first issue – **1 November 2006**.

## 7. Contact details

7.1 NHS SMS Legal Protection Unit liaison officer, NHS SMS, Weston House, 246 High Holborn, London WC1V 7EX

CPS Headquarters, 50 Ludgate Hill, London EC4M 7EX

## 8. Signatories

8.1 The signatories agree to implement the provisions of this memorandum and any arrangements set out in the attached documents.

### **For the Crown Prosecution Service**

Ken Macdonald QC, Director of Public Prosecutions

Date: xx/xx/xx

Signature: xx/xx/xx

### **For the NHS Business Services Authority – Counter Fraud and Security Management Division**

Name: Dermid McCausland, Managing Director

Date: xx/xx/xx

Signature: xx/xx/xx

# MEMORANDUM OF UNDERSTANDING BETWEEN THE CROWN PROSECUTION SERVICE AND THE NHS SECURITY MANAGEMENT SERVICE

## 1. Aim

- 1.1 This memorandum sets out the agreement between the NHS Security Management Service ('NHS SMS') and the Crown Prosecution Service ('CPS') to secure achievement of the common purpose of the effective prosecution of cases involving violence and abuse (whether physical, verbal, sexual or racial) against any member of 'NHS staff' (defined in Secretary of State Directions made under the National Health Service Act 1977 as 'any person who is employed by or engaged to provide services to an NHS body').
- 1.2 The aim of this memorandum is to foster an effective working partnership between the CPS and the NHS SMS. This relationship will be underpinned by:
- effective and efficient communication, including the exchange of information
  - a clear understanding of the respective roles, responsibilities and procedures, and any legal constraints.

## 2. Objectives

- 2.1 The objectives of the memorandum are:
- to issue a clear statement on prosecution policy which will engender confidence amongst NHS staff
  - to set out the roles and obligations of the parties to the memorandum
  - to promote communication and establish the framework for the exchange of information at Area level.

## 3. Background

- 3.1 NHS staff have an important role within our communities and they must feel safe in the environments they work in. To this end, NHS staff must feel confident that the criminal justice system will afford them the protection that they deserve.
- 3.2 NHS staff are at greater risk of violence or verbal abuse than many other professionals. This is underlined by statistics published on the NHS SMS website in November 2007, which show that in 2006–2007 there was:
- one physical assault for every six staff working in mental health and learning disability services (41,569 incidents in total)
  - one physical assault for every 32 ambulance staff (1,006 incidents)
  - one physical assault for every 96 primary care trust staff (3,445 incidents)

- one physical assault for every 75 staff working in acute hospitals, including A&E units (9,685 incidents in total).

## 4. The NHS Security Management Service

4.1 The Security Management Service (SMS) is part of the Counter Fraud and Security Management Service, a division of the NHS Business Services Authority (a special health authority). In December 2003, the Secretary of State for Health launched a new strategy for security management work in the NHS, developed by the NHS SMS. The organisation performs on behalf of the Secretary of State for Health Security Management Functions<sup>1</sup> and has overall responsibility for all policy and operational matters related to the management of security in the NHS<sup>2</sup> and a remit defined as:

*‘protecting people and property so that the highest standards of clinical care can be made available for patients’.*

4.2 The aim of the NHS SMS is to ‘protect the NHS so that it can better protect the public’s health’<sup>3</sup>. The remit of the NHS SMS does not extend to patients or visitors, although it is acknowledged that a duty of care is owed to these groups and, in particular, the young and vulnerable.

4.3 The current priority areas of action for the NHS SMS are:

- tackling violence against staff and professionals working in the NHS
- ensuring the security of property and assets
- ensuring the security of drugs, prescription forms and hazardous materials
- ensuring the security of maternity and paediatric wards.

4.4 In addition to the four main strands, the NHS SMS strategy is to work both proactively and reactively to tackle security management issues across the NHS through a range of generic actions:

1. Creating a pro-security culture
2. Deterring those who may be minded to breach security
3. Preventing security incidents and breaches from occurring
4. Detecting security incidents and breaches
5. Investigating security incidents and breaches
6. Applying sanctions against those responsible for security incidents or breaches
7. Seeking redress through criminal and civil justice systems from those responsible for security incidents or breaches.

4.5 The NHS SMS has put in place a number of measures to help increase the number of prosecutions and to prevent and deter violence against staff:

- The creation of the NHS SMS Legal Protection Unit (LPU), which provides legal services and support in relation to security matters. The LPU is

<sup>1</sup> Section 195 NHS Act 2006

<sup>2</sup> Statutory Instrument 2005/241402

<sup>3</sup> A Professional Approach to Managing Security in the NHS, NHS SMS, 2003

directed, by legislation, to work with healthcare bodies, the police and the CPS to increase the number of prosecutions (that are legally robust), and to provide cost-effective advice on available sanctions against individuals who are violent or verbally abusive towards NHS staff and professionals. The LPU may lawfully pursue private criminal prosecutions and civil litigation on behalf of NHS bodies in relation to assaults on and abuse of NHS staff. This power stems from Directions issued by the Secretary of State under the NHS Act 1977. When the LPU is considering whether to bring a private prosecution, it will apply its internal prosecution policy and adhere to section 5 of the CPS Code for Crown Prosecutors.

- Introduction of a network of Local Security Management Specialists (LSMSs) whose role is to provide a comprehensive, inclusive and professional security management service for their health bodies, particularly in relation to tackling violence. The LSMS is trained and accredited to undertake the role to a consistent high standard defined within a legal framework and they will work in partnership with the police to investigate assaults on staff. The role of the LSMS is supported at regional level by an Area Security Management Specialist (ASMS) who is employed by the NHS SMS.
  - A national reporting system for physical assaults to properly assess the problem and track repeat offenders.
  - A casework team to monitor incidents of assault and liaise with the police and CPS to support any investigation and subsequent prosecution, offering assistance and support where necessary. This team will liaise and work closely with witness care units.
- 4.6 A joint agreement between the Association of Chief Police Officers (ACPO) and the NHS SMS has been published. This agreement:
- provides a framework and guidelines for the investigation of offences against NHS staff
  - identifies joint working practices which are aimed at preventing crime against NHS staff and property
  - establishes clear lines of communication and liaison, both nationally and locally
  - aims to ensure that a response to a particular incident is appropriate.

## **5. The Crown Prosecution Service**

- 5.1 The Crown Prosecution Service (CPS) is the principal public prosecuting authority for England and Wales. Although the CPS works closely with the police, it is independent of them. Casework decisions are taken with fairness, impartiality and integrity, delivering justice for victims, witnesses, defendants and the public.
- 5.2 The police are responsible for investigating allegations of crime and for gathering evidence about what occurred. The CPS is responsible for deciding the charge in all but the most minor offences.

- 5.3 As agreed in the NHS SMS's memorandum of understanding with ACPO, the police will progress all cases of violence and abuse against NHS staff as a priority. The CPS will work with the police to ensure that these cases are treated with the seriousness that they deserve and encourage a robust charging policy to be applied by prosecutors.
- 5.4 When the CPS has decided not to charge, or has discontinued a case of assault against a member of NHS staff, the NHS SMS LPU may consider a private criminal prosecution or issue civil proceedings against the perpetrator. If this action is considered, the NHS SMS LPU will follow its internal prosecution policy and adhere to section 5 of the CPS Code for Crown Prosecutors.
- 5.5 The CPS has a discretionary power under section 6(2) of the Prosecution of Offences Act 1985 to take over criminal proceedings instituted by or on behalf of private individuals, and then discontinue them. This will only be done when there is a particular need to do so on behalf of the public – for example, a malicious prosecution or a prosecution that may interfere with the investigation of another criminal offence. The decision to take over proceedings can only be given by a Chief Crown Prosecutor, London Sector Director or one of the Directors of Organised Crime, Counter Terrorism or Special Crime.
- 5.6 If the CPS receives a request to take over a private prosecution conducted by the NHS SMS LPU, the Chief Crown Prosecutor, London Sector Director or Directors of HQ Casework, or a prosecutor appointed by such a person, will contact the NHS SMS LPU liaison officer (at the NHS SMS, Weston House, 246 High Holborn, London WC1V 7EX) to facilitate discussion with the relevant person before any such decision is taken. This contact will include sending relevant documentation that the CPS may have received from the requestor (such as medical expert reports on the defendant) to facilitate a meaningful dialogue. The third party will be informed by the CPS that this will be done and that this information will remain confidential.
- 5.7 The CPS will only take over a private prosecution brought by the NHS SMS LPU if it is apparent that it has disregarded or misapplied its own internal prosecution policy and/or section 5 of the CPS Code for Crown Prosecutors – for example, if there is clearly no case to answer or the public interest is plainly against prosecution.
- 5.8 Further reference should be made to the CPS legal guidance chapters on 'Private prosecutions' and 'Relations with other prosecuting 'authorities' (available at <http://www.cps.gov.uk/legal/section1/index.html> under 'Role of the Crown Prosecution Service').

## **6. The Code for Crown Prosecutors and Prosecution Policy**

- 6.1 All cases are reviewed by CPS prosecutors in accordance with the tests as set out in the Code for Crown Prosecutors. Prosecutors make charging decisions in line with the full code test, other than in limited circumstances where the narrower threshold test applies.

### **The full code test**

- 6.2 The full code test has two stages. 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 it may be. If the case does pass the

evidential test, prosecutors proceed to the second stage and decide if a prosecution is needed in the public interest.

### **The first stage – the evidential stage**

- 6.3 Prosecutors must be satisfied that there is enough evidence to provide a realistic prospect of conviction for each defendant on each charge. This means that a jury or a bench of magistrates or a judge hearing the case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.

### **The second stage – the public interest test**

- 6.4 If the case does pass the evidential test, prosecutors must then decide whether a prosecution is needed 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.
- 6.5 Paragraph 5.9d of the current Code for Crown Prosecutors provides that ‘a prosecution is likely to be in the public interest if the offence was committed against a person serving the public’. There are particular aggravating factors in offences involving NHS staff or on NHS premises (see appendix 2).

### **The threshold test**

- 6.6 The threshold test requires prosecutors to decide whether there is a reasonable suspicion that the suspect has committed an offence and, if there is, whether it is in the public interest to charge the suspect. This test is applied in those cases when it would not be appropriate to release a suspect on bail after charge, but the evidence to apply the full code test is not available. The threshold test can only be applied if it is reasonably anticipated that such evidence or information will shortly be available.
- 6.7 The full code test must be applied as soon as reasonably practicable after charge and a review date will be set by the prosecutor. This is the date by when the necessary information must be received and the full code test applied.

### **Application of the code to physical and verbal abuse against NHS staff**

- 6.8 Subject to the application of section 8 below, the CPS will robustly and fairly prosecute offences of violence or abuse that are committed against NHS staff. This memorandum will apply when a person is assaulted while either on duty or off duty if the victim is being targeted because of their work.
- 6.9 The abuse suffered may be physical, verbal or sexual, and it may be religiously or racially motivated.
- 6.10 The Code for Crown Prosecutors gives a clear indication of the strong public interest in prosecuting such violence as long as the evidential sufficiency test is met.
- 6.11 Drink and drug abuse will not be regarded as valid mitigating factors but rather as aggravating features. A further aggravating feature that prosecutors should consider is the potential harm to others if the assault may result in the withdrawal of medical services to those in need of attention (for example, the withdrawal of an ambulance crew or Accident and Emergency clinical staff).

- 6.12 This memorandum does not remove the need for each case to be considered on its own merit or restrict the discretion to prosecute the most appropriate offence depending on the facts of the case.

## 7. Charging standards

- 7.1 The CPS and police publish joint 'charging standards' for certain offence types to ensure that the most appropriate charge is selected at the earliest opportunity. Assaults against the person and public order offences are covered by their own individual charging standards.
- 7.2 The 'assaults against the person' charging standard reminds prosecutors of the provisions of paragraph 5.9d of the Code for Crown Prosecutors (see 6.5 above), which indicates that a prosecution is likely to be in the public interest if the offence is committed against those who serve the public. The charging standard provides examples of 'public servants' and refers to doctors and nurses. This principle expands to include all NHS staff (as defined above) and all offences committed against them, and not merely assaults.
- 7.3 Prosecutors should pay particular attention to paragraph 1 (viii) of the 'assaults against the person' charging standard when reviewing a case that involves an assault on an NHS staff member when the injuries are consistent with a charge of common assault. This paragraph provides that even when the injuries suffered are typical of common assault, the more serious charge of assault occasioning actual bodily harm may be more appropriate if there are 'aggravating features'. Such an aggravating feature may be the vulnerability of a victim who has to work with the public or in the community.

## 8. Diversion from prosecution

- 8.1 When reviewing a case, prosecutors may consider alternatives to prosecution where appropriate. This may arise when the prosecutor decides that while the public interest justifies a prosecution, the interests of the victim, the community and the suspect are better served by an alternative to the formal court process. For adult offenders, this might include a simple or conditional caution.
- 8.2 A simple caution is administered by the police on the recommendation of a prosecutor and should only be given if the public interest justifies it and in accordance with Home Office guidelines. It should be noted that ACPO has an agreement with the NHS SMS which states that it 'will not formally caution assailants without **obtaining** the views of the victim'<sup>4</sup>.
- 8.3 A conditional caution may be appropriate if a prosecutor is satisfied that there is sufficient evidence to meet the evidential requirements of the full code test but that while the public interest justifies a prosecution, the interests of the suspect, victim and community may be best served by the offender complying with suitable conditions. These conditions may be aimed at rehabilitation or reparation and may also be restrictive or compensatory. In cases where it is considered appropriate for conditions to include some restriction in attendance on NHS premises, or contact with NHS staff, the NHS SMS can provide assistance in drafting conditions which would facilitate this without preventing the individual from properly accessing NHS care.

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<sup>4</sup> Memorandum of understanding between ACPO and the NHS SMS, NHS SMS 2006

- 8.4 If an offender fails to comply with any of the conditions, he or she may be prosecuted for the original offence. Conditional cautions are administered by police officers on the advice of a prosecutor.
- 8.5 When considering whether to recommend that an offender is cautioned, prosecutors will have regard to Home Office Circular (HOC) 30/2005 (paragraph 8), which reminds police officers that an offence with aggravating features is likely to be deemed unsuitable for caution.
- 8.6 In the course of interviewing the victim about the offence, the police should ascertain what the victim's attitude would be towards an offer of reparation from the offender. If a caution (simple or conditional) is at that stage a possibility, this may be mentioned to the victim in order to ascertain their views, but it is vital not to give the impression that the victim's views alone will decide the outcome, which is at the discretion of the CPS. In exceptional circumstances, this might be impractical – for example, if the victim proves uncontactable and the matter can no longer be delayed. This is in accordance with paragraph 11 of HOC 30/2005 and part 7 of the Code of Practice for Conditional Cautioning. These sections reiterate the importance of establishing the victim's views before taking the decision on cautioning and of taking these views into consideration when determining whether it is right in all the circumstances to offer a caution to the offender.
- 8.7 Paragraph 58 of HOC 30/2005 makes it clear that the issue of a simple caution is not an automatic bar to a private prosecution, nor does it preclude civil action from being taken against an assailant (see section 16).

## **9. NHS SMS support for CPS prosecution**

- 9.1 To support a criminal prosecution, the CPS and police are likely to require evidence from NHS staff (and possibly patients), including medical reports, where appropriate, relating to the examination and treatment of the victim for any injuries sustained. The police gather evidence and will notify the LSMS in accordance with the NHS SMS/ACPO memorandum of understanding.
- 9.2 If problems are encountered in obtaining relevant information from NHS bodies which may potentially jeopardise a prosecution, the LSMS should be promptly notified. The LSMS will then liaise with the CPS, police and the relevant health body to ensure that requested information is provided as soon as practicable.
- 9.3 If the requested information is of such fundamental importance that a case cannot be prosecuted without it and it is reasonable for such evidence or information to be obtained, the CPS will request that the police take such steps as are thought reasonable and necessary to obtain the evidence or information before discontinuing the criminal prosecution.
- 9.4 When considering a request for evidential information, NHS bodies must bear in mind that the prosecution (whether prosecutors or police officers) must act with all due diligence and swiftness. Cases are at risk of being stopped or offenders being released from custody if there is any unreasonable and undue delay in obtaining evidence or relevant information.
- 9.5 Witness statements from hospital staff will be sought as soon as possible by the police for the preparation of a case. In accordance with the memorandum of understanding between the NHS SMS and ACPO, the police should ensure that staff who provide witness statements mark the rear of the statement form with

details of their known unavailability (e.g. holidays) to avoid delay and costs. Their preferred method of contact should also be provided on the form.

## **10. Escalation and appeals**

- 10.1 When requested, because a private prosecution or civil action may be brought, the CPS will provide detailed explanations of its review decisions in particular cases. Such requests should be made via the relevant NHS SMS liaison officer.
- 10.2 If there is disagreement on the CPS decision to charge, caution or not prosecute, or on the level of charge, concerns should be raised with the NHS SMS liaison officer. The liaison officer will then seek an explanation from the investigating officers, who may contact the Crown Prosecutor.
- 10.3 If any concerns are not satisfied and the investigating officers are unhappy with the CPS decision, the matter must be escalated in accordance with the procedure set out in the Director's Guidance on Charging (February 2007)
- 10.4 In such circumstances, the NHS SMS will be informed of discussions and relevant CPS decisions before the offender is informed.

## **11. The decision to prosecute and mentally disordered offenders**

- 11.1 It is recognised that many acts of violence, abuse and threats of violence against NHS staff are committed by those who may be suffering from a mental disorder. 'Mental disorder' is defined in the Mental Health Act 1983 as including mental illness, mental impairment, severe mental impairment and psychopathic disorder. Mental disorder is not in itself a bar to prosecution.
- 11.2 Mental disorders vary in nature and degree and the fact that a person has such a disorder is not an automatic bar to prosecution. Similarly, the fact that a person is detained under a section of the Mental Health Act 1983 is not an automatic bar to prosecution. It is the responsibility of the CPS to consider alternative disposals and to prosecute offenders when it is in the public interest to do so. The CPS, where necessary, applies Home Office guidelines on how to deal with mentally disordered offenders and follows internal legal guidance on definitions and the factors to apply.
- 11.3 The disposals under the Mental Health Act include:
  - compulsory admission for assessment and medical treatment for up to 28 days, under section 2 if a patient warrants detention
  - compulsory admission for assessment and treatment for up to six months (initially), under section 3 if a patient is suffering from mental illness or psychopathic disorder and it is necessary for the protection of others
  - emergency admission for assessment for up to 72 hours, under section 4, on application by an approved social worker or relative
  - guardianship for up to six months, under section 7
  - court-ordered admission to hospital or guardianship under section 37 following conviction where the court is satisfied that the patient has a mental disorder which is of a nature which makes it appropriate for them to be detained in hospital for treatment
  - informal admission to hospital under section 131, after detention comes to an end.

- 11.4 It should be borne in mind that the guidance issued by the NHS SMS on the reporting of assaults against NHS staff states that all cases should be reported to the police 'except in those cases where the Security Management Director in the health body, having consulted with relevant staff and obtained clinical advice, has reached the conclusion that the assault was not intentional and that the patient did not know what he was doing, or did not know what he was doing was wrong due to the nature of his medical illness, mental ill health or severe learning disability or the medication administered to treat such a condition'<sup>5</sup>. This means that cases should be reported if the staff present have formed an initial view that the offender's behaviour has not arisen as a result of any condition or treatment.
- 11.5 The Code for Crown Prosecutors provides important guidance to prosecutors when applying the public interest test in cases involving a mentally disordered offender. There is a factor against prosecution if a defendant, at the time of the offence, was suffering from significant mental or physical ill health unless the offence is serious and/or there is a real possibility that it may be repeated. Prosecutors should also consider whether a prosecution may help a defendant take responsibility for his or her actions.
- 11.6 Furthermore, the CPS Code for Crown Prosecutors provides that there is a public interest factor against prosecution if the court is likely to impose a nominal penalty. Similarly, if an offender is already receiving treatment which a court might subsequently order upon conviction, careful consideration should be given to whether to proceed with the prosecution. The views of the alleged offender's responsible medical officer at the health body must also be sought and considered. It is also important to establish the mental health status of an alleged offender who is receiving treatment (for instance, it may be voluntary, under section, or as a result of a court order, etc). If treatment is likely to be an important factor in the decision to prosecute, the relevant NHS body should be contacted, through the local liaison officer, LSMS or the NHS SMS, and asked to provide current information along with any opinion it feels appropriate.
- 11.7 The existence and treatment of a mental disorder is only one of the factors to be taken into account when deciding whether the public interest requires a prosecution. The seriousness or persistence of the relevant behaviour and, importantly, the views of the victim and the offender's responsible medical officer at the health body must also be considered.
- 11.8 It is important to understand that the decision to prosecute must be determined on the relevant public interest factors, once the test for evidential sufficiency has been met. The perceived need for the treatment and management of a mental disorder will not be the sole reason for pursuing a prosecution. This decision should be based on an individual's needs and the risk he or she poses to himself or herself and others and not on the existence of a prosecution and/or conviction.
- 11.9 The CPS will need information and evidence regarding the mental disorder at the earliest opportunity in order to properly review a case involving a mentally disordered suspect. This will ensure that appropriate cases are properly progressed and will prevent any arbitrary decisions from being taken regarding a person's mental health or capacity without the decision-maker obtaining the fullest information. Such information should include, where appropriate, details regarding the suspect's capacity at the time of the alleged offence(s), and their fitness to be

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<sup>5</sup> *Tackling violence against staff – explanatory notes*, NHS SMS, 2004

arrested, detained, interviewed and charged, and to plead. Further information should also be requested in relation to whether he or she has acted in a similar manner before, the likelihood of further offences, and the mental health status and treatment of the alleged offender. A prompt response will be required and the NHS SMS should assist the police and CPS in obtaining the information from the relevant NHS body when required. The CPS should immediately notify the NHS SMS if it is having difficulty in obtaining any information relevant to its review of the case. The information that may be requested includes:

- medical reports from appropriate clinician or responsible medical officers to explain the nature and degree of the disorder and the treatment and behaviour of the patient
- any other relevant information from other hospital staff about the treatment and behaviour of the patient, including the treatment regime, history of similar and recent violent or otherwise offending behaviour
- information about an offender's status in hospital – whether voluntary or detained under section 2 or section 3 (civil procedures) or under section 37 (Court Hospital Order) and whether there is a restriction order under section 41 attached to the section 37 order
- evidence from a suitably qualified clinician about the offender's state of mind at the time of the incident, including whether the patient knew what he or she was doing, whether the patient knew that what he or she was doing was wrong and, if not, whether the lack of knowledge was attributable to his or her disorder and/or any medication or other treatment for his or her disorder
- evidence regarding the person's fitness to plead.

11.10 Prosecutors may not always be aware from the outset that an offender has a mental disorder, particularly if the offence was committed in or around the accident and emergency department of a hospital, or the offender is receiving treatment in another department, hospital or healthcare establishment or in the community. Initial information may come from the custody sergeant or police surgeon in connection with fitness to be detained and/or be interviewed and the need for an appropriate adult to attend. Alternatively, the information may come from defence representatives, court staff or any other person who has had dealings with the suspect. In such cases, there may be an urgent need for medical reports and information to clarify the nature and degree of the mental disorder. These requests should be treated as a priority by the NHS SMS and NHS body.

## 12. Anti-Social Behaviour Orders (Asbos)

- 12.1 When reviewing a case where an NHS staff member has been assaulted, threatened or abused, prosecutors should always consider whether it may be appropriate to apply for an anti-social behaviour order (Asbo) on conviction. There is no qualification in terms of the type of offence, but two tests must be satisfied in order to qualify:
- that the individual has committed an act of anti-social behaviour; and
  - that an order is necessary to protect members of NHS staff or wider public.
- 12.2 A number of different public bodies may apply for Asbos, in addition to the CPS prosecutor's power to apply for an Asbo on conviction. It is advisable that the LSMS consult with relevant agencies in the area before an Asbo application is forwarded to the CPS to ensure that there is a coordinated approach to applications and that all relevant evidence is put forward with the application.
- 12.3 In cases where the CPS applies for a post-conviction Asbo, it is important that appropriate evidence is obtained at the earliest opportunity. The defence must be served with a copy of the papers and notified that an application is pending. Appropriate evidence will include:
- statements from witnesses to the incident
  - CCTV imagery
  - medical records
  - impact of the behaviour on those NHS staff who were subjected to it
  - incident reports or other evidence of previous anti-social behaviour.
- 12.4 It is important that the NHS SMS works closely with the police and CPS to assist their drafting of appropriate conditions to be attached to the Asbo. The full extent of the anti-social behaviour must be covered in draft orders, e.g. harassment, phone calls, threatening behaviour, etc.
- 12.5 After a post-conviction order has been served on a defendant, it will be recorded on the police national computer. The relevant NHS trust(s) should be informed of the making of the order, the prohibitions that it contains and its expiry date so that they can circulate this information to the relevant health body. Publicity of the order will be a matter for the NHS SMS and the healthcare establishment. The *Home Office Guide to Anti-Social Behaviour Orders*<sup>6</sup> provides guidelines on the handling and appropriateness of publicity and these should be followed.

### Breaches and modifying conditions of Asbos

- 12.6 In the event of a breach of an Asbo, the NHS SMS will assist in providing evidence to the police about the behaviour which caused the breach. It will be referred to the CPS for consideration of charge.
- 12.7 If, during the duration of the order, the subject behaves inappropriately and in such a way as to avoid the conditions of the order, the LSMS or the NHS SMS

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<sup>6</sup> Published August 2006

should raise this with the CPS, via the police, in order for consideration to be given to varying the Asbo conditions.

- 12.8 If circumstances change and there is a need to discharge the Asbo, the CPS will apply to the court if there is evidence to support the application, it is appropriate to do so and all the parties have consented.

### **Other orders available to restrict and protect**

- 12.9 In some cases, because of either the particular nature of the offending or a focus on a particular individual or organisation, an Asbo will not be appropriate. In such cases, consideration should be given to reminding the court of other avenues available to restrict the offender's future conduct and offer protection to victims, for example:

#### Criminal Justice Act 2003

Section 203 Prohibited Activity Requirement

Section 205 Exclusion Requirement

#### Protection from Harassment Act 1997

### **Section 5 Restraining Order**

- 12.10 The health body's LSMS or NHS SMS should be contacted to ensure that the conditions of such orders offer the protection required while still allowing legitimate access to health services.

### **Sentencing**

- 12.11 Section 143(1) of the Criminal Justice Act 2003 provides: 'In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused'.
- 12.12 Sentencing guidelines for a particular offence will normally include a list of aggravating features which, if present in an individual instance of the offence and are relevant, should be taken into account.
- 12.13 Among the factors indicating higher culpability is the commission of an offence while under the influence of alcohol or drugs. Among the factors indicating a more serious than usual degree of harm is the fact that an offence is committed against those working in the public sector or providing a service to the public. Both of these may be of particular relevance when determining the appropriate sentence for offences of violence and abuse against NHS staff.
- 12.14 Prosecutors also have a duty, as set out in the Attorney General's guidance, to draw the court's attention to the impact of the offending on a community. Examples of the possible impacts are referred to in appendix 2 – Particular aggravating factors in offences involving NHS staff or on NHS premises. The LSMS will be able to provide further information if required.

## 13. Bail and conditions

- 13.1 If a suspect or defendant is deemed suitable for bail, it is important that the police and CPS work closely with the NHS SMS in formulating appropriate conditions to protect the NHS and its staff as promptly as possible. Similar conditions to those used in Asbos might be considered – for example, exclusion orders. Information that is provided must be accurate, current and clear. The NHS SMS LPU will always provide guidance on appropriate bail conditions; for examples of conditions which might be used in an acute hospital setting, see appendix 1.
- 13.2 When appropriate, consideration should be given to including a condition that if the suspect needs to attend hospital for genuine emergency treatment, they will not be excluded under the terms of their bail.
- 13.3 If a suspect is released on bail to return to the police station or to attend court, the police must notify victims of this, along with the reasons for granting bail and any relevant bail conditions, within five working days. Similarly, if bail conditions are altered or bail is cancelled, the police must notify victims within five working days.

## 14. Treatment of NHS staff as victims

- 14.1 The CPS is committed to delivering the *CPS Public Policy Statement on the Delivery of Service to Victims* to all witnesses. This reflects the Farquharson guidelines on the roles and responsibilities of the prosecution advocate and the Bar CPS standard for communication between victim and witnesses and the prosecution advocate.

### Decision to prosecute

- 14.2 It is the duty of the CPS to ensure that victims are informed of charging decisions taken by the CPS. In a case in which a person has been charged but a decision is then made by the CPS to discontinue, or the initial charge is withdrawn and a less serious charge is preferred, the prosecutor will write to the victim to inform him or her of the decision and the basis upon which it was made.
- 14.3 If, after discussion with the investigating officer, an initial decision is taken not to charge, it is the responsibility of the police to notify the victim. If a decision is taken not to charge after a prosecutor has received a full evidential file other than during discussion with a police officer, it will be the responsibility of the CPS to notify the victim of this fact. In any circumstance, this may be done through the LSMS. If, in accordance with CPS guidance, it is decided that the victim should not be told, the LSMS should be informed of this fact. There is a requirement placed upon LSMSs in Secretary of State for Health Directions to ascertain the outcome of prosecutions in cases of violence.
- 14.4 The NHS SMS LPU should also be informed of decisions not to prosecute via the police and LSMS.
- 14.5 If, after an offender has been charged, the CPS takes a decision to alter substantially or drop any charge, the CPS will notify the victim. In certain serious cases, the CPS must offer to meet the victim to explain a prosecution decision.

- 14.6 When a guilty plea is offered to the CPS at court, and wherever practical, the prosecutor will speak with the victim or victim's family attending court to ensure that any views expressed are taken into account when considering the acceptability of the plea. If necessary, the prosecutor will seek an adjournment in order to facilitate a discussion.

### **Witness care units**

- 14.7 Joint police and CPS witness care units (WCUs) are responsible for supporting victims and witnesses and keeping them informed about progress of their case following a 'not guilty' plea by a suspect. The WCU will:
- provide a single point of contact for a victim or witness in a case
  - conduct a full needs assessment with all victims and witnesses where a 'not guilty' plea is entered
  - notify victims and witnesses of any requirement for them to give live evidence, and any subsequent amendment to this requirement
  - notify victims and witnesses of the dates of all criminal court hearings, and any subsequent amendments to those dates
  - provide victims and witnesses who are to be called as witnesses with a copy of the 'Witness in Court' leaflet
  - notify victims and witnesses of the outcome of all pre-trial hearings, the verdicts of the trial, the sentence if the suspect is convicted and the effect of that sentence.

### **Victim care during progress of a case**

- 14.8 The prosecutor will always address the specific needs of a victim or witness.
- 14.9 Before every trial, prosecutors will consider whether it is absolutely necessary to require the attendance of a witness. Where possible, the CPS will seek to agree evidence, although it is a matter for the defence whether they wish to agree any evidence or not. Ultimately, the success of a prosecution must not be jeopardized by the prosecutor dispensing with a witness's attendance for reasons of convenience.
- 14.10 The service of copied originals of the medical notes, which can be attached to the relevant statement, may help to avoid calling a member of NHS staff as a witness.
- 14.11 When NHS staff are required to attend court to give evidence and support a prosecution, the CPS will seek to minimise the impact of their being called by applying to the court for standby arrangements. Where the distance from the hospital or place of employment to the court makes it a practical option, such arrangements will be offered.
- 14.12 The CPS will consult the court to see if agreement to the terms of the standby arrangements can be obtained and will inform the police of the agreed arrangements. Full use should be made of pager/bleep numbers and mobile telephones.

## Special measures

- 14.13 If a victim who is to be called as a witness in criminal proceedings is identified as potentially vulnerable or intimidated as defined in sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999, special measures may be applied for to assist them in giving their evidence at court. These special measures may include giving evidence behind a screen or via a TV link so that the witness does not have to give evidence in court. The availability of special measures will depend on whether the witness is vulnerable or intimidated.
- 14.14 It is the role of investigators to establish at an early stage whether a witness is likely to qualify for a Special Measures Direction and, if so, which particular measures will assist. The views of the victim will be important as to whether and which special measures should be applied for, and will be carefully considered. The CPS will specifically consider applying for special measures in such circumstances.
- 14.15 The WCU will ensure that any change of circumstances that may affect the victim's decision on special measures is appropriately communicated to that person and, likewise, communicate back to the police and CPS any change of views/circumstances that the witness may have experienced.

## Compensation

- 14.16 When the victim has been injured or has suffered financially, or the relevant NHS body has suffered financial loss or damage, the CPS will:
- ensure that the information given to prosecutors on compensation claims is sufficient for the court to make a compensation order if it wishes
  - remind the court of its power to award compensation in cases where there is no financial loss (e.g. personal injuries sustained)
  - remind the court that it must give reasons where a compensation order is not made if the case is one in which an order may have been possible.

## Victim personal statement

- 14.17 When relevant, the police should obtain a victim personal statement and, with the consent of the victim, check its currency with the LSMS. This statement can then be relied upon by the prosecutor when an offender is being sentenced and will provide the court with a full and up-to-date picture of the impact of the offence on the victim.

## 15. Communication and liaison

- 15.1 NHS SMS and CPS Areas should develop local protocols to improve local communications. This can be facilitated by the nomination of a CPS liaison officer who will link in with the LSMS.
- 15.2 The key objectives in building a local communications network between the NHS, CPS and police are:
- to improve the protection of NHS staff

- to strengthen the prosecution process, by improving the quality of information exchanged
  - to improve victim and witness care.
- 15.3 Police-designated divisional/area single points of contact, as outlined in the memorandum of understanding between the NHS SMS and ACPO, should also be consulted to provide a consistent approach and ensure that a national standard approach is taken. A list of accredited LSMSs for specific CPS areas can also be obtained by emailing [securitymanagement@cfsms.nhs.uk](mailto:securitymanagement@cfsms.nhs.uk) detailing the area or NHS trust required.

## **16. Disclosure of information to the NHS SMS Legal Protection Unit**

- 16.1 While the LPU will work with health bodies and provide them with advice on cost-effective methods of pursuing sanctions against offenders and will work with the police and the CPS to increase the number of prosecutions arising from physical and non-physical assaults, there may also be occasions when the victim or their health body requests the LPU to review a case to determine whether private criminal or civil action is appropriate. This may arise following a decision by the police and/or the CPS not to charge an offender or not to proceed with a criminal prosecution.
- 16.2 The LPU may require a copy of the evidential case file in order to make an informed judgement on whether criminal or civil proceedings are appropriate. If criminal proceedings are anticipated, the LPU will apply its internal prosecution policy and adhere to section 5 of the CPS Code for Crown Prosecutors.
- 16.3 Such requests should be directed to the police. If the CPS receives such a request, it will be forwarded to the police for consideration. It is a matter for the police or WCUs to obtain the consent of witnesses or other individuals before personal information relating to them is released to a third party. This is in line with the obligations placed on the CPS and police authorities contained within the Data Protection Act 1998. Due regard must, however, be given to any relevant information-sharing gateways – in particular, sections 29 and 35 of the Data Protection Act 1998 for the release of information in appropriate circumstances.
- 16.4 If the LPU is considering a private prosecution, the prosecutor should, when requested, consider providing a full explanation of their decision not to prosecute or why the offender was cautioned.

## **Generic conditions for ASBO's bail conditions, injunctions restraining orders etc**

It is ordered that the defendant

- i) be prohibited, without having first notified the relevant establishment of his true name, and that he is the subject of this order, from entering in person any premises or grounds, belonging to, or under the control of any NHS body, or any premises where NHS services are provided except in the following circumstances –
  - a. where he or a member of his immediate family require urgent or emergency medical treatment,
  - b. to attend himself, or to accompany a member of his immediate family, at a pre-arranged appointment,
  - c. to attend himself as an in-patient or to visit a member of his immediate family who is an in-patient,
  - d. to attend for non medical purposes any meeting previously arranged in writing.
- ii) be prohibited from entering any part of the premises described in (i) above, which is not open to the public for the purposes of accessing NHS services, except by invitation.
- iii) must not refuse to comply with any instruction to remain in, or to remove himself from any area of the premises described in (i) above.
- iv) be prohibited from remaining on any premises (including its grounds) described in (i) above when asked to leave.
- v) be prohibited from removing any object, article or other thing from the premises described in (i) above which he is not authorised to.

### **Particular aggravating factors in offences involving NHS staff or on NHS premises**

There is a strong public interest in maintaining the effective provision of healthcare services and prosecutors should always consider whether the offending behaviour has further aggravating features relating to this.

Examples of such aggravating factors in such offences would include:

- the withdrawal from service of an emergency ambulance and the potential for harm this may cause to those in urgent need of this service
- the withdrawal of staff from active duty in accident and emergency units and the resultant reduction in service
- the vulnerability of staff working in the community, particularly those who work alone or at night
- the potential impact of patients in mental health and learning disability units and the effects that being exposed to such behaviour may have on them.

Consideration should also be given to the fact that there are high levels of violence and unacceptable behaviour in the NHS (see paragraph 3.2) and the following factors from the Code for Crown Prosecutors may be applicable:

- there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct; or
- the offence, although not serious in itself, is widespread in the area where it was committed.
- a prosecution would have a significant positive impact on maintaining community confidence.