

PRACTICE NOTE

Conviction and Caution Allegations

This Practice Note has been issued by the Council for the guidance of Practice Committee Panels and to assist those appearing before them.

Introduction

Article 22(1)(a)(iii) of the Health Professions Order 2001 (the **Order**) provides that one of the grounds upon which an allegation may be made is that a registrant's fitness to practise is impaired by reason of:

“(iii) a conviction or caution in the United Kingdom for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence.”.

Thus, what are often termed ‘conviction allegations’ include allegations that a registrant's fitness to practice is impaired as a consequence of:

- being convicted for an offence by a criminal court in any part of the UK;
- accepting a caution for an offence from a UK police force or law enforcement agency;
- being convicted by a court outside of the UK, but for an offence which is recognised as a crime in English law¹; or
- being convicted by a Court Martial.²

Convictions allegations are not about punishing a registrant twice for the same offence. A conviction or caution should only lead to further action being taken against a registrant if, as a consequence of that conviction or caution, the registrant's fitness to practise is found to be impaired. The Panel's role is "*to protect the public and maintain the high standards and reputation of the profession concerned*"³

Cautions

The practice for administering cautions varies in England and Wales, Scotland and Northern Ireland but certain common principles apply throughout the UK.

¹ in cases involving convictions by a court outside of the UK, at an early in the investigative process HPC will seek legal advice to confirm whether the conviction is for an offence which is also an offence under English law and to identify the equivalent English law offence.

² Article 22(2) of the Order extends the definition of conviction to include convictions by Courts Martial.

³ *Zidderman v GDC* [1976] 1 WLR 330

Cautions are generally a discretionary, non-statutory,⁴ means of disposing of offences without the need for the offender to appear before a court. Typically, they are used for first time, low level offences by adults, where diversion from the courts is appropriate for both the offence and the offender.

Although most cautions are non-statutory disposals, they are nonetheless treated as an 'offence brought to justice' and will appear on Criminal Records Bureau and equivalent criminal record checks. For that reason, there are safeguards in place to protect the offender in all three UK jurisdictions, the principles of which are that cautions should only administered where:

- the evidence of guilt is sufficient to provide a realistic prospect of conviction;
- the offender make a clear and reliable admission of the offence; and
- the offender understands the significance of, and gives informed consent to accepting, the caution.

Cautions should not be administered where there is insufficient evidence to bring a prosecution, or where a person does not admit of the offence or there are doubts about the offender's capacity to do so.

Binding Over and Discharge

The powers available to certain criminal courts include the power to 'bind over' offenders or to discharge them either absolutely or subject to conditions. These methods of disposal do not constitute a 'conviction' for the purposes of Article 22(1) of the Order.

Binding over is a preventative measure which, even though it may be imposed as a penalty, is not regarded as a criminal conviction. Similarly, the Powers of Criminal Courts (Sentencing) Act 2000 provides that 'absolute discharge' and 'conditional discharge' orders are not to be treated as a conviction for the purposes of any enactment (such as the Order) which authorises the imposition of any disqualification or disability upon convicted persons.

Consequently, in cases where a registrant is bound over or receives an absolute or conditional discharge, a conviction allegation cannot be made against the registrant, but the HPC will investigate the circumstances which led to that action being taken, in order to determine whether an allegation of misconduct should be made against the registrant.

Dealing with conviction allegations

The procedural rules for Practice Committee Panels provide that:

⁴ In England and Wales, the Police and Justice Act 2006 provides for statutory 'conditional cautions', which allow offenders to be cautioned for more serious or repeat offending, subject to complying with specified rehabilitation or reparation conditions. Panels should deal with conditional cautions in a similar manner to any other conviction or caution.

“where the registrant has been convicted of a criminal offence, a certified copy of the certificate of conviction (or, in Scotland, an extract conviction) shall be admissible as proof of that conviction and of the findings of fact upon which it was based;”⁵

Those rules also provide⁶ that, evidence is admissible before a Panel if it would be admissible in civil proceedings before the appropriate court⁷ in that part of the UK where the Panel is sitting. In all three UK jurisdictions, evidence that a person has been convicted of an offence is generally admissible in civil proceedings as proof that the person concerned committed that offence, regardless of whether or not the person pleaded guilty to that offence.

Consequently, in considering conviction allegations, Panels must be careful not to “go behind” a conviction and seek to re-try the criminal case.

The Panel’s task is to determine whether fitness to practise is impaired, based upon the nature, circumstances and gravity of the offence concerned, and, if so, whether any sanction needs to be imposed. A similar approach should be adopted when considering cautions, as a caution cannot be administered unless the offender has made a clear admission of guilt.

In considering the nature, circumstances and gravity of the offence, Panels need to take account of public protection in its broadest sense, including whether the registrant’s actions bring the profession concerned into disrepute or may undermine public confidence in that profession. In doing so, Panels are entitled to adopt a ‘retrospective’ approach and consider the conviction as if the registrant was applying for registration with the HPC.⁸

Although Panels cannot re-try criminal cases, they may have regard to whether the registrant pleaded guilty to the offence and, if so, at what stage in the proceedings. A guilty plea entered at the first reasonable opportunity is indicative of a greater insight on the part of the registrant than one entered at the last moment. A registrant who is convicted of an offence but maintains that the conviction was wrong may lack insight into their offending behaviour and this may have a significant bearing upon the sanction which a Panel should impose in order to protect the public.

In reaching its decision, a Panel should also have regard to any punishment or other order imposed by the courts, but must bear in mind that the sentence imposed is not a definitive guide to the seriousness of an offence. Panels should not assume that a non-custodial sentence implies that an offence is not serious. One factor which may have led the court to be lenient is the expectation that the registrant would be subject to regulatory proceedings.

⁵ HPC (Investigating Committee) (Procedure) Rules 2003, r.8(1)(d); HPC (Conduct and Competence Committee) (Procedure) Rules 2003 and HPC (Health Committee) (Procedure) Rules 2003, r.10(1)(d).

⁶ *ibid*, r.8(1)(b) and r.10(1)(b).

⁷ i.e., the High Court of Justice in England and Wales; the Court of Session; or the High Court of Justice in Northern Ireland;

⁸ *CRHP v GDC and Fleischman* [2005] EWHC 87 Admin

As Dame Janet Smith noted in the *Fifth Shipman Inquiry Report*, “The fact that the court has imposed a very low penalty or even none at all should not lead the [regulator] to the conclusion that the case is not serious in the context of [its own] proceedings... The role of the [regulator] in protecting [service users] involves different considerations from those taken into account by the criminal courts when passing sentence... What may well appear relatively trivial in the context of general criminal law may be quite serious in the context of [professional] practice.”

As noted in *Fleischman*,⁹ if a registrant has been convicted of a serious criminal offence and is still serving their sentence at the time the matter comes before a Panel, normally the Panel should not permit the registrant to resume their practice until that sentence has been satisfactorily completed.

Community Sentences

In considering any sentence imposed, Panels need to recognise that community sentences are used to address different aspects of an individual's offending behaviour and, therefore, may not simply be an order to undertake unpaid community work but may also include other orders such as compliance with a curfew, exclusion from certain areas or an order to undergo mental health, drug or alcohol treatment.

Panels need to give careful consideration to the terms of any community sentence but, generally, should regard it as inappropriate to allow a registrant to remain in or return to unrestricted practice whilst they are subject to such a sentence.

Sex Offenders Register

Similar consideration needs to be given to any requirement to register under the Sex Offenders Act 1997.

Although inclusion on the sex offenders' register is not a punishment, it is intended to secure public protection from those who have committed certain types of offences. Generally, Panels should regard it as incompatible with HPC's obligation to protect the public to allow a registrant to remain in or return to unrestricted practice whilst subject to registration as a sex offender.

Child Pornography Offences

The ease with which child pornography can be downloaded from the internet has resulted in a significant increase in cases involving child pornography before both the courts and regulatory bodies.

Panels should be aware that, in *R v Oliver*,¹⁰ the Court of Appeal established a test for determining the seriousness of offences involving child pornography by reference to the nature of (1) the activity undertaken and (2) the images involved.

⁹ CRHP v GDC and Fleischman [2005] EWHC 87 Admin

¹⁰ [2003] 1 Cr. App. R 28

In relation to the nature of the activity, consideration needs to be given to:

- proximity to, and responsibility for, the original abuse. Taking the original photographs is more serious than downloading images, which, in turn, is more serious than merely locating images on the Internet; and
- any element of commercial gain or activity, which although not for gain, fuels demand for such images (e.g. swapping of material).

In relation to the nature of the images, a scale from 1 to 5 has been set based upon the harm caused to the children involved in producing those images:

- Level 1: erotic posing with no sexual activity;
- Level 2: sexual activity between children, or solo child masturbation;
- Level 3: non-penetrative sexual activity between adults and children;
- Level 4: penetrative sexual activity between children and adults;
- Level 5: sadism or bestiality.

Panels should have regard to the *Oliver* criteria, but need to recognise that the courts distinguish between degrees of seriousness largely to assist them in reaching sentencing decisions.

The Council considers that any offence relating to child pornography involves some degree of exploitation or abuse of a child and, therefore, that conviction for such an offence is a serious matter which seriously undermines public trust in the registrant and the profession concerned.

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