Council Meeting, 20 May 2016

Fitness to Practise – Amendment to the Standard of Acceptance for Allegations

Introduction

Policies and practice notes are regularly reviewed to ensure they remain fit for purpose and reflect changes in case law and regulatory practice.

The Standard of Acceptance for Allegations sets out the Council's policy in relation to the threshold for fitness to practise allegations. It outlines a "modest and proportionate" threshold which allegations must normally meet before they will be investigated by the HCPC.

The policy was last considered by Council at its May 2015 meeting and implemented in June 2015. A further amendment to the policy is now necessary to ensure that registrants who have been cautioned or convicted for criminal offences are treated equitably irrespective of the UK jurisdiction in which they practise or reside. The need for this change arises from legislative differences between the jurisdictions in relation to the rehabilitation of offenders.

Background

The Rehabilitation of Offenders Act 1974 seeks to support the rehabilitation of reformed offenders by providing for a substantial number of criminal offences to become 'spent' after specified periods of time. The Act applies throughout Great Britain and separate, but very similar, arrangements apply in Northern Ireland - under the Rehabilitation of Offenders (Northern Ireland) Order 1978.

Unless a statutory exception applies, a person does not need to disclose 'spent' convictions when asked about their criminal record. One of the statutory exceptions is that spent convictions must be disclosed for the purpose of assessing a person's suitability for registration by the HCPC.

In 2013 the Court of Appeal of England and Wales ruled in *R (T and others) v Chief Constable of Greater Manchester and others* that the blanket disclosure of all convictions and cautions under a statutory exception was disproportionate. As a result of this ruling the relevant law in England and Wales - the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 - was amended to introduce the concept of "protected" convictions and cautions. As the Court of Appeal's jurisdiction is limited to England and Wales, no changes were made in Scotland or Northern Ireland.

In 2014 the UK Supreme Court affirmed the decision in *R (T and others)* and made a declaration of incompatibility under the Human Rights Act 1998, on the basis that the statutory exceptions regimes represented an unjustifiable interference with an individual's Article 8 right to respect for private life.

Since this decision was of UK-wide application, the relevant law was also subsequently amended in Scotland and Northern Ireland. In consequence the disclosure regime that applies to applicants and registrants now depends upon the UK country in which the individual resides or practises. Detailed differences in the regimes are outlined in Appendix 1.

Impact

The HCPC must respect the differences between the national disclosure regimes as these control the information which, by law, the Council is or is not entitled to require a registrant or applicant for registration to provide.

In terms of the use which the HCPC makes of disclosed convictions (and, in England and Wales, cautions), however, it is important to remember that the disclosure regimes are not referred to directly in the Health and Social Work Professions Order 2001. The information disclosed simply forms part of the totality of information taken into account in assessing an applicant's or registrant's character for the purpose of determining whether that person is capable of safe and effective practice.

As the regime in England and Wales generally provides the highest degree of protection/rehabilitation, in order to ensure that all applicants and registrants are treated equitably we propose that paragraph 14.1 of the Standard of Acceptance should be amended as indicated by the marked changes (see Appendix 2). The effect of this amendment would be that, unless the Director of Fitness to Practise (or a person authorised by the Director) directed otherwise, an allegation would not proceed further if it was solely based upon a caution or conviction which, in respect of the registrant concerned, would be a protected caution or protected conviction in England and Wales under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. This amendment has been drafted by Special Counsel.

Decision

The Council is asked to approve the amended 'Standard of Acceptance for Allegations' policy.

Resource implications

There are no additional resource implications as a result of this paper.

Financial implications

There are no additional financial implications as a result of this paper.

Appendices

Appendix 1 Protected convictions and cautions

Appendix 2 Standard of Acceptance for Allegations

Date of paper

May 2016

APPENDIX 1

Protected convictions and cautions

England and Wales

In England and Wales, a spent conviction is a "protected conviction" if:

- it does not relate to a “listed offence”;
- no custodial sentence was imposed;
- the person has no other convictions; and
- either:

    if the person was under 18 when convicted, five and a half years or more have elapsed; or

    if the person was 18 or over when convicted, 11 years or more have elapsed.

In England and Wales, a police caution is a "protected caution" if it does not relate to a “listed offence” and either:

- if it was given to a person under 18 at the time of the caution, two years or more have elapsed; or
- if it was given to a person aged 18 or over at the time of the caution, six years or more have elapsed.

For either purpose a “listed offence” means an offence to which Article 2A(5) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 applies.

Scotland

In Scotland, a spent conviction is to be a "protected conviction" if:

- it does not relate to an offence in the lists of offences which:

    must always be disclosed; or

    are to be disclosed subject to rules; or
- it relates to an offence in the list of offences which are to disclosed subject to rules but at least one of the following applies:

    the sentence imposed was an admonition or absolute discharge;

    if the person was under 18 when convicted, seven and a half years or more have elapsed; or

    if the person was 18 or over when convicted, 15 years or more have elapsed.

A person who would otherwise need to disclose a ‘Schedule B1’ or ‘Schedule 8B’ offence (offences which are to be disclosed subject to rules) can apply to a Sheriff

under section 116ZB of the Police Act 1997 for that offence to be omitted from a disclosure certificate.

The Sheriff may grant that application if satisfied that “the details are not relevant for the purpose for which the certificate was required”. In that event, Disclosure Scotland will issue a new certificate with the relevant offence(s) omitted.

As there is no equivalent to police cautions in Scotland, the legislation makes no reference to the disclosure of alternative disposals to prosecution in that jurisdiction.

Northern Ireland

In Northern Ireland, a spent conviction is a "protected conviction" if:

- it does not relate to a “listed offence”;
- no imprisonment, service detention or custodial order was imposed;
- the person has no other convictions; and
- either:

    if the person was under 18 when convicted, five and a half years or more have elapsed; or

    if the person was 18 or over when convicted, 11 years or more have elapsed.

For this purpose “listed offence” means an offence listed in Article 1A(4) of the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979.

APPENDIX 2

Standard of Acceptance for Allegations

1. Introduction

The Health and Social Work Professions Order 2001 (the **Order**) provides that the HCPC's primary function is to set and maintain standards for the professions it regulates, with the objective of protecting the public. An important and visible part of that work is the investigation and adjudication of allegations which are made against registrants.

To ensure that allegations are considered appropriately, this document sets out a modest and proportionate threshold which allegations must normally meet before they will be investigated by the HCPC. That threshold is known as the "standard of acceptance".

In relation to allegations, our primary concern is that registrants are 'fit to practise', in the sense that they have the knowledge, skills and character to practise their profession safely and effectively. However, fitness to practise is not just about professional performance. It also includes acts by a registrant which may have an impact on public protection or confidence in the profession or the regulatory process. This may include matters not directly related to professional practice.

Our proceedings are designed to protect the public from those whose fitness to practise is "impaired". They are not a general complaints resolution process, nor are they designed to resolve disputes between registrants and service users or to punish registrants for past mistakes.

Although allegations are only made against a small minority of HCPC registrants, investigating them properly is a resource-intensive process. Therefore, it is important to ensure that the available resources are used effectively to protect the public and are not diverted into investigating matters which do not raise cause for concern. Importantly, we recognise that registrants do make mistakes or have lapses in behaviour and we will not pursue every minor error or lapse.

The standard of acceptance is an important safeguard against the diversion of resources but, as the HCPC's primary concern is public protection, it does not set rigid and unbending rules. Under Article 22(6) of the Order, the HCPC has a discretion (which has been delegated to the Registrar) to investigate relevant information even when it does not meet the formal requirements for an allegation.

2. Allegations

Part V of the Order enables the HCPC to consider:

fitness to practise allegations: to the effect that a registrant's fitness to practise is impaired by reason of one or more of the 'statutory grounds' set out in the Order:

- misconduct;
- lack of competence;
- conviction or caution for a criminal offence;
- physical or mental health; or
- a fitness to practise or similar determination by another health or social care regulatory or licensing body.

register entry allegations: to the effect that an entry in the HCPC register relating to a registrant has been fraudulently procured or incorrectly made.

2.1 Fitness to practise allegations

Fitness to practise allegations comprise three elements:

- the facts upon which the allegation is based;
- the statutory ground (e.g. misconduct) which it is alleged those facts constitute; and
- the proposition that, based upon that statutory ground, the registrant's fitness to practise is impaired.

If an allegation proceeds to a final hearing, it will be for the HCPC to prove the facts to the civil standard of proof (the balance of probabilities). The other two elements, the statutory ground and impairment, do not require specific proof but are matters for the judgement of the Panel hearing the case, based on the proven facts.

Importantly, the applicable test is that fitness to practise is impaired. The fitness to practise process is not about punishing registrants for past acts but is about public protection going forward. The need to establish impairment at the time a case is heard is often an important factor in deciding whether to pursue fitness to practise allegations.

2.2 Register entry allegations

Register entry allegations are relatively rare. They are not fitness to practise allegations, in the sense that they are simply concerned with whether an entry was made in error or obtained by fraudulent means. They are subject to simpler investigative and adjudicative processes and are only subject to limited further consideration in this policy document.

3. Meeting the standard of acceptance

A fitness to practise allegation meets the standard of acceptance if:

- it is made in the appropriate form; and
- in respect of the registrant against whom it is made, it provides credible evidence which suggests that the registrant's fitness to practise is impaired.

A register entry allegation meets the standard of acceptance if:

- it is made in the appropriate form; and
- in respect of the registrant against whom it is made, it provides credible evidence which suggests that an entry in the HCPC register was incorrectly made or fraudulently procured.

3.1 The "appropriate form"

Article 22(5) of the Order requires allegations against registrants to be received "in the form required by the Council" (the **appropriate form**). A fitness to practise allegation or register entry allegation is in the appropriate form (and thus meets the first requirement of the standard of acceptance) if it:

1. is received by the HCPC in writing;
2. sufficiently identifies the registrant against whom the allegation is made; and
3. sets out:

   (a) the nature of the allegation; and

   (b) the events and circumstances giving rise to it;

   in sufficient detail for that registrant to be able to understand and respond to that allegation.

Where a registrant has been convicted of, or received a caution for, a criminal offence or has been the subject of a determination by another regulatory or licensing body, a certificate of conviction, notice of caution or notice of determination issued by a court, the police or any other law enforcement, regulatory or licensing body is also regarded as being in the appropriate form.

3.2 "in writing"

The requirement that allegations must be made in writing is intended to assist in obtaining all relevant information from complainants, not to act as an obstacle to the making of allegations.

If a complainant's initial contact with the HCPC is by other means, the complainant should be advised about the standard of acceptance and assisted to submit any allegation in writing. This may be achieved by:

- giving the complainant advice on how to put the allegation in writing;
- sending the complainant a copy of the HCPC brochure *How to raise a concern* and a complaint form to complete (which may be partly completed using the information already provided); or
- taking a statement of complaint and sending it to the complainant or their representative for verification and signing.

3.3 "sufficiently identifies"

The requirement that an allegation "sufficiently identifies" a registrant recognises that, for good reason, complainants may not always be able to provide a registrant's

full name. This is particularly so for service users, who may encounter registrants in circumstances where they may not be given the registrant's name.

In such cases, if the complainant is able to provide information which is sufficient to enable the HCPC by reasonable efforts to trace the registrant concerned (for example, a first name and the date and professional setting in which the events took place) then this requirement should be regarded as met.

If an allegation is found not to relate to a current HCPC registrant but the person concerned may be registered with another regulator, the complainant should be given appropriate advice and, with their consent, any relevant documents should be passed to that regulator.

Similarly, where a complaint does not raise concerns about the fitness to practise of a registrant but where the complainant has raised issues which should be investigated by another body (e.g. a facility regulator or ombudsman). The complainant should be provided with appropriate signposting and other advice to assist them to pursue the matter.

3.4 "the nature of the allegation"

It would be unreasonable for the HCPC to assume that complainants, particularly service users, are familiar with the technical detail of its fitness to practise process.

The requirement to set out "the nature of the allegation" is about substance and not form. It is met where a complainant provides an allegation in sufficient detail for a preliminary decision to be reached as to whether it raises concerns about a registrant's fitness to practise or inclusion in the register, as opposed to being a more general complaint about services or policy. Complainants are not expected, for example, to specify the statutory ground of an allegation or specifically to state that a registrant's fitness to practise is impaired.

3.5 Credible evidence

The second requirement of the standard of acceptance, that an allegation provides "credible evidence" which suggests that fitness to practise is impaired or a register entry was fraudulent or incorrect, deliberately imposes a relatively low threshold.

The standard of acceptance is not intended to act as a barrier to the making of allegations, but simply to act as a filter to ensure that resources are not expended on pursuing matters which do not raise a credible cause for concern.

The requirement that evidence is "credible" does not require a complainant to prove at the outset that it is true. The test is that the information provided needs to be sufficient to cause a reasonable person to consider that it is worthy of belief.

What constitutes credible evidence will vary from case to case, but evidence is more likely to be regarded as credible if it provides a coherent, logical and reasonable explanation of the events in question, particularly if it is either supported by other evidence (e.g. contemporaneous notes or other documents) or is consistent with already known facts. Where the information initially provided by a complainant does not amount to credible evidence, it may be appropriate for the complainant to be asked whether they can supply any further detail before a decision is taken as to whether the standard of acceptance is met.

The evidence provided must be credible in respect of the allegation as whole, in other words, the nature of the facts alleged must suggest that fitness to practise is impaired or a register entry has been wrongly made.

If an allegation is not pursued due to a lack of credible evidence, it is important for complainants to understand that this does not mean they have been disbelieved, but simply that the evidence provided was insufficient to enable the allegation to be pursued further.

3.6 "fitness to practise"

Typically, fitness to practise allegations fall into one of two broad categories:

- matters related to professional practice in its widest sense. This includes associated tasks, such as proper record-keeping or appropriate communication with service users, and extends to management, research or teaching which is sufficiently closely linked to professional practice; and
- matters that may be (and often are) unconnected with professional practice, but which involve disreputable or morally culpable conduct which may undermine public confidence in the relevant profession.

Fitness to practise is not just about professional performance. It also encompasses acts by registrants in both their professional and personal life which may have public interest implications, including:

- protecting service users;
- maintaining public confidence in the profession and regulatory process;
- declaring and upholding proper standards of conduct and behaviour.

Alleging that a registrant's fitness to practise is impaired is a serious matter. It is not simply a suggestion that a registrant has done something wrong but, in essence, that they have done something which is serious enough to raise doubts about whether they should be allowed to continue to practise, either on an unrestricted basis or at all.

Registrants do sometimes make mistakes or errors of judgment and it would not be in the public interest for the HCPC to create a 'climate of fear' which led registrants to believe that every minor lapse will be pursued. The fitness to practise process should be used to address serious concerns and, for example:

- a single act or omission, unless it is particularly serious, is unlikely to amount to misconduct which is sufficient to establish that fitness to practise is impaired;
- a single instance of negligent care, unless it is particularly serious, is unlikely to amount to a lack of competence, as the latter usually implies an unacceptably low standard of professional performance when judged against a fair sample of the registrant's work;
- acts which are unconnected with practice, should be of a kind which the public would rightly consider to be disreputable for a member of the profession concerned.

It is important to note that the test of impairment is expressed in the present tense; that fitness to practice "is impaired". The process is not designed to punish registrants for past misdeeds, but to take account of past acts or omissions in determining whether a registrant's ongoing fitness to practise is impaired.

4. Case closure

Every allegation received by the HCPC must be considered on its merits and, as the HCPC's main objective is public protection, there is a presumption in favour of making further inquiries about an allegation unless it clearly does not meet the standard of acceptance.

A decision not to proceed with an allegation on the basis that it does not meet the standard of acceptance should only be taken after consideration of all the available information. At this stage in the process, any doubts should be resolved in favour of public protection, by allowing the allegation to proceed. In marginal cases, such doubts can often be resolved by reviewing the allegation in the light of the additional information provided by the registrant in response to the allegation.

If an allegation is found not to meet the standard of acceptance and the case is closed, it is important that clear reasons for the decision are recorded.

Where an allegation is closed at this stage, although it does not form part of a registrant's formal HCPC record, it is intelligence which may be taken into account if a further allegation is made against that registrant.

5. Time limit

Article 22(3) of the Order allows the HCPC to investigate allegations relating to events which occurred at any time, even at a point before the person concerned was a registrant.

However, significant practical difficulties may arise when allegations are not reported to the HCPC in a timely manner. These include the destruction or loss of records and other physical evidence and witnesses having a poor recollection of events or being untraceable.

Normally, allegations will not be regarded as meeting the standard of acceptance if they are made more than five years after the events giving rise to them.

That time limit does not apply to:

- an allegation based upon a criminal conviction or caution or regulatory determination (which does not present the same potential evidential difficulties, as there is no need to 'go behind' the decision of the court or tribunal which imposed the conviction etc.);
- an allegation which, in the opinion of the Director of Fitness to Practise, appears to be serious and in respect of which the time limit should be waived in the public interest or in order to protect the public or the registrant concerned.

6. Anonymous allegations

Anonymous allegations may take two forms:

- an allegation made by a person whose identity is unknown to the HCPC; and

- an allegation made by a person whose identity is known but who has asked the HCPC not to disclose his or her identity.

The procedures set out in the Order and the rules made under it require the HCPC to provide registrants with details of any allegations made against them, to allow the registrant to comment and then enable the HCPC to seek any necessary clarification from the complainant before proceeding further.

It is extremely difficult to operate such a process in a fair and transparent manner if the complainant is unknown or refuses to be identified. Generally, the HCPC will not take action in respect of anonymous allegations and complainants need to be made aware that a request for anonymity may prevent the case from progressing further.

This policy should not be applied in an over-rigid manner. The primary function of the HCPC is to protect the public and there may be circumstances in which an anonymous allegation raises concerns which are so serious that action should be taken. In such circumstances the Director of Fitness to Practise (or a person authorised by the Director) has the discretion to authorise further investigation.

7. Matters resolved locally

Often, issues may have been resolved satisfactorily at a local level before they are brought to the attention of the HCPC. In such cases it is unlikely that there will be evidence to suggest that the fitness to practise of the registrant concerned is impaired and, therefore, the standard of acceptance will not be met.

Credible evidence of current impairment is unlikely to be found in cases:

- relating to relatively minor conduct, competence or health issues;
- where the registrant has acknowledged, and has insight into, any failings;
- where appropriate remedial action has been taken;
- where the behaviour is unlikely to be repeated; and
- which do not raise any wider public protection issues, such as confidence in the profession or regulatory process or the deterrence of other registrants.

In deciding whether a matter has been satisfactorily resolved locally, the factors which may be relevant include the time which has elapsed since the event(s) in question, the registrant's conduct since then, whether the registrant has continued to practise without incident or undergone any form of training or, conversely, has only undertaken restricted duties or been dismissed by their employer.

8. Employment issues

In most cases, complaints involving minor employment issues which do not compromise the safety or well-being of service users will not meet the standard of acceptance. Typical examples are:

- lateness or poor time keeping, (but not if it has a direct impact on service users, such as delaying handovers or leaving service users at risk);
- personality conflicts, provided that there is no evidence of bullying or harassment;

- concerns about performance in a role that is not sufficiently closely linked to professional practice;
- sickness or other absence from work, provided that there is no misconduct (e.g. fraudulent claims) and the registrant is managing his or her fitness to practise.

9. Complaints about professional decisions

In the course of their professional duties HCPC registrants often have to make difficult decisions, particularly when performing statutory functions, and not everyone will agree with those decisions (or opinions, recommendations, etc.) or the consequences that may flow from them.

In making decisions registrants are expected to use their professional knowledge, skills and experience, taking account of all relevant factors, the resources available to them and the circumstances of the particular case.

Understandably, those who are adversely affected by a professional decision may disagree with it (for example, an adverse comment about them in a report, a decision that they are not eligible for some form of special assistance or welfare benefit or a recommendation that a court should not grant custody of a child). However, the fitness to practise process is not an appropriate mechanism for 'second guessing' registrants' professional judgement or challenging the content of professional reports or the exercise of statutory powers.

Allegations which seek to do so will rarely meet the standard of acceptance unless there is evidence that, for example, the registrant knowingly made a false or misleading statement, acted beyond their scope of practice or otherwise acted in bad faith.

10. Complaints against registrants acting as expert witnesses

In acting as expert witnesses, registrants do not enjoy any general immunity from fitness to practise proceedings. However, in dealing with allegations against such registrants, the HCPC must be careful not to interfere in matters which are properly for another court or tribunal to determine.

As a general principle, the admission of expert evidence is a matter for the court or tribunal in question. It is for that body to decide what expert evidence (if any) it needs and to control experts, their reports and evidence. Consequently, complaints about a registrant who is acting as an expert witness should be raised with the court or tribunal concerned and not the HCPC. This is especially so where the primary concern is dissatisfaction with the opinion expressed by the expert, which is properly a matter for the court or tribunal which has heard the evidence.

HCPC fitness to practise proceedings should not be used as a forum for re-trying cases heard elsewhere, nor for settling differences of professional opinion which are often a reality of legal proceedings and, of themselves, will rarely be sufficient to sustain a fitness to practise allegation.

The requirement that an allegation must include credible evidence which suggests that fitness practise is impaired is unlikely to be met unless it can be shown that, in acting as an expert witness, the registrant departed from the professional obligations imposed upon experts, such as:

- making false claims of expertise or giving evidence outside of the registrant's expertise;
- breaching the expert's paramount duty to assist the court or tribunal; or
- breaching the obligation to produce an objective, unbiased, independent report based upon all material facts.

11. Service and 'linked' complaints

The HCPC can only consider allegations relating to individual registrants. It cannot investigate complaints which are about services more generally, for example, where the complaint relates to dissatisfaction with:

- the services offered or provided by an organisation; or
- the provision or withdrawal of services or funding by an organisation.

Where a service complaint appears to raise wider, systemic, issues which may need to be investigated by another body (e.g. a system regulator), the complainant should be given appropriate advice and, with their consent, any relevant documents should be passed to that body.

A 'linked' complaint about several registrants from the same organisation (or who are similarly connected) should not automatically be treated as a service complaint.

However, in order for such a complaint to meet the standard of acceptance, it must contain credible and specific evidence relating to the fitness to practise of each registrant who is identified in the complaint. Evidence of some form of common or collective action on the part of the registrants concerned may be sufficient for this purpose, but it must be specific and relate to their fitness to practise. A generalised complaint which simply identifies the registrants who were encountered by the complainant in the course of dealing with an organisation is insufficient to meet the standard of acceptance.

12. Consumer complaints and business disputes

Where the substance of a complaint involves consumer related issues or a business dispute, and there is no evidence of misconduct or risk to public protection, it is unlikely that the matter will satisfy the requirement that the allegation relates to fitness to practise. Such cases will include:

- complaints about minor differences in the pricing of goods or services;
- disputes about business or personal debts;
- complaints which have no public protection implications, but are made on the basis that the complainant is aware that a party to a dispute is a registrant (e.g. boundary disputes between neighbours).

If there is any evidence of abuse of a registrant-service user relationship, the matter should be treated as a potential fitness to practise issue.

13. Internet social networks

Allegations which relate to registrants' participation in internet social networks should be treated in a similar manner to any other allegation. However, in considering

whether such allegations meet the standard of acceptance, the following should be taken into account:

- whether there is sufficient evidence to identify the registrant concerned (for example, where a complaint relates to anonymous or pseudonymous comments);
- the extent to which the registrant expected the material to enter the public domain (for example, where the complaint is from another member of a closed group or forum);
- whether the material has been taken out of context (for example, comments which were jocular, qualified in some way or withdrawn) or may not be a balanced reflection of the views expressed by the person concerned;
- the extent to which material has a bearing on fitness to practise, for example by identifying or relating to service users, colleagues or workplaces or raising wider fitness to practise issues (such as racially offensive or homophobic comments, inciting criminal acts, etc.)

14. Criminal offences

Registrants must inform the HCPC if they are convicted of, or accept a caution for, a criminal offence (other than protected conviction or caution).

One of the statutory grounds for an allegation is that a registrant's fitness to practise is impaired by reason of a conviction or caution. Therefore, the HCPC has a legitimate interest in being informed of all offences and, in particular, those which are likely to have a bearing on fitness to practise, such as offences involving:

- violence;
- dishonesty;
- inappropriate sexual behaviour;
- substance abuse or the possession or supply of drugs; or
- racially motivated, homophobic or similar conduct.

Failure to disclose a conviction or caution to the HCPC constitutes misconduct and a fitness to practise allegation may be pursued against a registrant on that ground even if the underlying offence is one which, had it been disclosed by the registrant, would not be regarded as serious enough to meet the standard of acceptance.

14.1 Spent and protected convictions, etc.

Under the Rehabilitation of Offenders Act 1974, most convictions or cautions become 'spent' after a specified rehabilitation period. Subject to limited exceptions, once a conviction or caution is spent, an offender is regarded as rehabilitated and treated as if the offence had never been committed.

One exception is that all convictions or cautions, including those that are spent, must be disclosed to regulatory bodies such as the HCPC unless the conviction or caution is 'protected'.

~~A caution is 'protected' if six years have elapsed since the date of the caution (or two years if the person was under 18 at the time of the offence).~~

~~A conviction is 'protected' if:~~

- ~~11 years have elapsed since the date of conviction (or five and a half years if the person was under 18 at the time of the offence);~~
- ~~it is the person's only offence; and~~
- ~~it did not result in a custodial sentence.~~

The 'Exceptions Orders'[1] **to the Rehabilitation of Offenders Act 1974 protect cautions and convictions from being disclosed after a specified time has elapsed and other specified criteria are met, unless they relate to an offence which is 'listed' under the relevant Exceptions Order.**

~~A conviction or caution will not be protected if it is for a 'listed offence' identified in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. There are more than 1,000~~ **The** 'listed' offences including terrorism, human trafficking, serious violent and sexual offences and other offences which are of specific relevance to the safeguarding of children and vulnerable adults. The lists can be found on the ~~Disclosure and Barring Service (DBS)~~ website**s of the disclosure services**.[2]

As protected convictions and cautions do not need to be disclosed to the HCPC, an allegation which is solely based upon such a conviction or caution should not proceed further. Older ~~DBS and Criminal Records Bureau~~ **disclosure** certificates may include information about convictions or cautions which have become protected or the information may be disclosed in error by registrants or others. If so, such cautions or convictions should be disregarded.

~~Although the concept of protected cautions and convictions is derived from legislation which only applies in England and Wales, for consistency this policy should be applied to all registrants.~~

In order to ensure that registrants are treated equitably, unless the Director of Fitness to Practise (or a person authorised by the Director) directs otherwise, an allegation should not proceed further if it is solely based upon a caution or conviction which, in respect of the registrant concerned, would be a protected caution or protected conviction in England and Wales under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.

14.2 Motoring offences, penalty fares, etc.

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1 the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 and the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979.

2 www.gov.uk/government/organisations/disclosure-and-barring-service
www.disclosurescotland.co.uk
www.nidirect.gov.uk/campaigns/accessni-criminal-record-checks

Other than in exceptional circumstances (for example, where there is associated evidence that the safety of the public or service users has been compromised), the following should not be regarded as the basis of a fitness to practise allegation:

- parking and other penalty charge notice contraventions;
- fixed penalty (and conditional offer fixed penalty) motoring offences; and
- penalty fares imposed under a public transport penalty fare scheme.

In respect of other motoring offences, the information received should be assessed on a case by case basis. Other than in cases involving serious offences or where there is evidence of the public or service users being put at risk (for example, failing to stop at, or leaving the scene of, a road traffic collision), it is unlikely that an offence will meet the final element of the standard of acceptance; that the allegation relates to fitness to practise.

Drink-driving offences should be regarded as meeting the standard of acceptance if:

- the offence occurred in the course of a registrant's professional duties, en-route to or directly from such duties or when the registrant was subject to any on-call or standby arrangements;
- there are aggravating circumstances connected with the offence (including but not limited to failure to stop or only doing so following a police pursuit, failure to provide a specimen, obstructing police, etc.);
- the penalty imposed exceeds the minimum mandatory disqualification from driving (12 months, with or without a fine); or
- it is a repeat offence.

15. Ongoing external investigations

The HCPC is often informed when a registrant is the subject of an investigation by another organisation (for example, the police or another regulatory body) or another purpose (for example, serious case reviews). There is no strict legal rule which prevents the HCPC from pursuing an allegation concurrently with an investigation or proceedings by another body. However, there are often practical difficulties in doing so and whether it is appropriate must be considered on a case by case basis.

In any case where sufficient information is provided to meet the standard of acceptance, preliminary inquiries should be undertaken to determine whether it is appropriate for the HCPC to proceed with the allegation concurrently or, if not, whether any immediate action is necessary, such as applying for an interim order.

In cases where the standard of acceptance is not met (for example, because the HCPC has been informed at a preliminary stage whilst the other body's evidence-gathering process is still underway) then the information should be treated as intelligence and the body concerned should be asked to provide the HCPC with all relevant information as the case progresses.

HCPC rules[3] prevent the Registrar from removing a registrant's name from the register if the registrant is subject to an allegation, investigation or proceedings. If a registrant applies to have their name removed from the register while they are subject to an ongoing investigation by another body but where the standard of acceptance has not been met, further inquiries should be made of that body before the application is considered.

16. Drafting formal allegations

If the standard of acceptance is met, a formal allegation will be drafted by the HCPC and sent to the registrant concerned with the supporting material which is available at that time. The formal allegation may differ quite significantly in style from the original allegation and will only address those aspects of that allegation which have been found to meet the standard of acceptance.

Practical guidance on the drafting of fitness to practise allegations, for HCPC Case Managers and Investigating Committee Panels, is set out as an Annex to this policy document.

[May] 2016

[3] rule 12(3), Health and Care Professions Council (Registration and Fees) Rules 2003

ANNEX

Drafting Fitness to Practise Allegations

Introduction

The right to a fair hearing requires registrants to be given adequate prior notice of any allegation against them, so that they have a fair opportunity to:

- understand the allegation, including the material facts upon which it is based;
- properly consider whether to admit or deny the allegation and, at the appropriate stage in the proceedings, if they so choose,
    - to make representations;
    - to prepare any defence or mitigation;
    - to answer the case against them by presenting evidence and making submissions on the applicable law and standards, etc.

That right is protected by Article 6 of the European Convention on Human Rights and reflects the common law principles of natural justice.

The HCPC's approach

The approach adopted by the HCPC is that a formal allegation should be drafted and put to the registrant concerned as early as possible in the process, so that the registrant understands what is being alleged and has the opportunity to submit representations on that allegation when a Panel of the Investigating Committee considers whether, in respect of that allegation, the registrant has a 'case to answer'.

In reaching its decision, the Investigating Committee Panel is expected to consider each element of the allegation, to see whether there is evidence to support the facts alleged and whether those facts would amount to the statutory ground and establish that fitness to practise is impaired. Panels should also consider allegations 'in the round' to ensure that they strike the right balance in terms of the case which the registrant must answer.

As part of that process the Panel may amend or omit elements of an allegation. As allegations are drafted at an early stage, whilst information is still being gathered in a dynamic investigative process, it is important that Panels give critical scrutiny to the drafting of allegations put before them. Investigating Committee Panels must ensure that any allegation which proceeds further is a fair and proper representation of the HCPC's case and is fit for purpose.

If an Investigating Committee Panel allegation varies or extends an allegation to a material degree, the registrant concerned should be given a further opportunity to make observations on the revised allegation to the Investigating Committee before a final case to answer decision is made.

Drafting allegations

Every fitness to practise allegation must be drafted so it alleges that, based upon one or more of the statutory grounds set out in Article 22(1) of the Order, the registrant's fitness to practise is impaired.

Allegations must be drafted in clear and unambiguous language which enables the registrant concerned and anyone else reading them to understand what is being alleged. So far as possible, the elements of the allegation should be set out:

- briefly, concisely and in ordinary language which avoids the unnecessary use of technical terms or jargon;
- in separate paragraphs, each dealing with a single element of the allegation;
- with the facts in chronological order (unless there is good reason to do otherwise),
- in the logical decision-making sequence of facts, statutory ground and, impairment.

So, for example:

Allegation

1. *In the course of your employment as a [profession] by [Employer] (**XYZ**) you were provided with access to a computer at [place of work] belonging to XYZ.*

2. *Between [dates], contrary to XYZ's Internet Access Policy, you used that computer to:*

   (1) search for the terms of a sexual nature identified in Schedule 1;

   (2) access websites containing pornographic material;

   (3) download pornographic images from such websites and store them on the computer in the files identified in Schedule 2.

3. *Each of the matters set out in paragraphs 2(1), (2) and (3) constitutes misconduct.*

4. *By reason of that misconduct, your fitness to practise is impaired.*

Practical drafting points

An allegation is not a case summary

Formal allegations should not be a simple repetition or paraphrasing of the allegation as it was received from the complainant. The information provided is likely to include statements of opinion, details of minor employment issues and other material which is not relevant to the fitness to practice process.

An allegation does not need to contain every last detail provided to the HCPC but should be limited to material which is or may be relevant to the issue of impaired fitness to practise and any sanction which may be imposed.

A well-structured allegation will help the Panel to identify the salient facts, to reach determinations and to provide reasons for them. If an allegation is written in a

narrative style or contains unnecessary detail, the Panel will have to engage in needless fact-finding and reasoning.

If an allegation is indirectly based upon a large number of events over an extended period of time, there is no need to set out every event unless a Panel needs to make a finding of fact in respect of each event. For example, where an allegation is based upon the outcome of a workplace capability process, the Panel's focus is likely to be on the overall findings and outcomes from that process, rather than the detail of each of the events that led to it. In such cases, the detailed information can be set out in a schedule to the allegation.

Organise, logically and chronologically

Panels must reach decisions in a logical sequence; are the facts proved, do they amount to the statutory ground and, if so, is fitness to practise impaired? Consequently, it will rarely be appropriate to deviate from setting out an allegation in that sequence.

Where an allegation contains more than one statutory ground, the facts should still be set out first and the grounds then set out after all of the facts, but identifying which facts are alleged to meet which ground (for example "The matters set out in paragraphs 1-4 constitute misconduct. The matters set out in paragraphs 5 to 9 constitute a lack of competence").

It is important to be clear about whether the HCPC is alleging that all the facts cumulatively need to be proved in order to amount to the statutory ground. This can usually be resolved by using the phrases "the matters set out" or "each of the matters set out" and careful use of "and" and "or" in the paragraph which contains the statutory ground.

Unless there is good reason to do otherwise, facts should be set out in chronological order, so that events can be understood in the time sequence in which they occurred.

Strike the right balance

Allegations need to be a balanced and proportionate reflection of the case against a registrant, so that Panels do not have to engage in pointless fact-finding and reasoning. That balance will not be achieved by including every last detail known to the HCPC or by adopting a superficial approach which leaves out salient facts. A common sense balance must be struck.

Allegations must also reflect the appropriate level of seriousness, so that the registrant understands the case they must answer. If the registrant's action can be interpreted in more than one way, then those interpretations may need to be alleged 'in the alternative'. For example, it would be unfair to allege that certain facts amounted to misconduct but then to find that they amounted to a lack of competence when the latter option had not been put to the registrant.

Take care with adjectives.

Except where specific findings of fact need to be made on professional performance, terms suggesting that a registrant's actions were, for example, "inappropriate",

“inadequate” or “not of the standard expected” are rarely necessary. The appropriateness or adequacy of a registrant’s action is not a question of fact but a matter for the judgement of the Panel based upon the facts found proved.

The same is not true of allegations that a registrant’s actions were, for example, “dishonest” or “sexually motivated”. These are questions of fact on which the Panel will need to make specific findings, as they go to the registrant’s state of mind at the time of the allegation.

Dishonesty and other ‘state of mind issues’ must be specifically alleged unless they are already clearly encompassed within the words of the allegation, for example “you stole X” or “you sexually assaulted Y”.

Be as specific as possible

Allegations should not be overloaded with detail, but important detail – dates, locations, words said, etc. - should be included and be as specific as possible. If there is any uncertainty then this should be made clear (for example, “on or around [date]”, “at or near to”, “…or words to that effect”).

Care should be taken not to confuse “failed” for “did not”. The former requires a finding that a registrant should have done something as well as not doing it, the latter only that a registrant did not do something.

Refer indirectly to sensitive information

Service users should not be identified by their names or their initials, but simply as Client A, etc. Similarly, in health allegations, the details of a registrant’s health should not appear in the allegation but should be specified in a confidential schedule to the allegation.