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ADVICE

1. I am asked to advise on:
 - i. the differentiation between a caution, a guilty plea and a full trial verdict [of guilty];
 - ii. “Appeal rights exhausted”
 - iii. Whether there is an impact on the risk level to Post Office.
2. I am also asked to provide some brief speaking-notes on these issues.

1. Cautions, guilty pleas and jury convictions

3. A suspect alleged to have committed a criminal offence may either be charged with the commission of that offence, in which case the matter proceeds to court, or they may be the subject of a Formal Caution.

Formal Caution

4. A Formal Caution is a non-court criminal disposal designed to deal with minor offending by diverting such offenders away from the courts whilst nevertheless recognising the criminality of the misconduct involved. According to the Home Office, the aims of the formal caution are:
 - i. to offer a proportionate response to low level offending where the offender has admitted the offence;
 - ii. to deliver swift, simple and effective justice that carries a deterrent effect;

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- iii. to record an individual's criminal conduct for possible reference in future criminal proceedings or in criminal record or other similar checks;
- iv. to reduce the likelihood of re-offending;
- v. to increase efficiency whilst simultaneously reducing the burden on the courts.

5. The following conditions **must** be met before a caution can be administered.

- i. there must be evidence of guilt sufficient to give a realistic prospect of conviction in the event the matter went for trial;
- ii. the suspect **must** admit the offence, that is, there must be a clear and reliable admission of the offence. Note that, where an offence contains an element of dishonesty, that dishonest conduct **MUST** be admitted by the person before a caution can be administered;
- iii. the offender must understand the significance of a caution and give informed consent to being cautioned.

6. Where the available evidence does not meet the standard normally required to bring a prosecution, *i.e.* The test in the Code for Crown Prosecutors, a caution cannot be administered.

7. Although a caution is not a conviction, it forms a part of a person's criminal record and will remain on that record permanently. The caution can be used as evidence of bad character if a person is later convicted of a further offence. A caution might also provide the recipient with difficulties in obtaining visa's to visit certain countries, including the United States.

8. The acceptance of a caution by the defendant carries certain compelling advantages, for instance: they will not be prosecuted through the courts; they will suffer no further

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punishment; the case will not be publicised; in many cases they need not declare the fact of the caution in applications *etc.*

Guilty plea

9. A guilty plea entails the complete admission to the commission of an offence, although such a plea may be qualified in terms of the extent of the alleged wrongdoing. Such a qualification must be set out in writing in a formal ‘Basis of Plea’ document. Most commonly, a Basis of Plea will admit the commission of a fraud or false accounting but assert that no money was taken by the offender. Such a Basis does not amount to a defence to the charge but in effect means “Guilty – but only to this extent...” The prosecution may accept or reject a Basis of Plea. Where the Basis of Plea is accepted, the defendant is sentenced in accordance with the wrong-doing set out in the Basis of Plea.

10. A guilty plea is a formal admission of guilt to the court and as such attracts “credit” which goes to reduce the sentence otherwise imposed had the defendant pleaded not guilty and taken the matter to trial. Credit is intended to reflect the defendant’s admission of wrong-doing, remorse, the sparing of witness attendance and the saving of court time and resources. The amount of credit is determined by timing of the plea: the earlier a plea (*e.g.* by admissions in interview or an early court hearing) the greater the credit obtained.

Guilty verdict following trial

11. The defendant has asserted his or her innocence at trial but the jury have convicted. The only substantive difference between a guilty verdict and a guilty plea lies in the sentence imposed.

Summary

12. Both the Formal Caution and the Guilty Plea represent formal admissions of guilt, that is, admissions to having committed a criminal offence. A Guilty Verdict is a finding of guilt in the face of a denial. In that sense:

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- i. all three amount to the same thing: that is, all three represent the commission of criminal mis-conduct by the defendant (including, where such is an element of the offence, dishonesty).
- ii. All three are recorded on a person's PNC, or criminal record.
- iii. All three are taken into consideration when sentenced for further offences.

13. Accordingly as a matter of criminal law both the recipient of a Formal Caution and a defendant who pleads guilty to an offence may not be distinguished, as both have admitted the commission of criminal offences and thus in that sense are no different from each other. The only distinction to be drawn between them is that of process and disposal. Similarly, a defendant found guilty following a trial is different in the sense only that they have continued to deny their wrong-doing. Thus both Applicants Coates (M076) and Banks (M057) stand in the same position – both are regarded in law as being guilty of criminal misconduct.

2&3. “Appeal rights exhausted” and Risk Impact to POL

14. In his email containing these instructions Andrew Parsons of Bond Dickinson sought to clarify this phrase thus:

“I think by "appeal rights exhausted" David is querying whether it would make a difference to the risk of mediating a case if the SPMR has, off the back of the Scheme, already appealed and lost.”

15. As matters presently stand, within the scope of the review process, no SPMR or clerk convicted of an offence prosecuted by POL has sought to lodge an appeal with the Court of Appeal. Thus so far, there can be no such risk as is alluded to. That does not mean however that any SPMR is precluded from lodging an appeal later, and off the back of the Scheme. It is this risk to which I therefor apply myself.

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16. The fact that no convicted offender has sought to appeal his conviction is instructive, for those who genuinely believed themselves to be innocent of wrongdoing would, to retain any degree of credibility, be bound to seek permission to appeal. None have done so. All would have been advised by lawyers as to both the possibility of an appeal and likely chances of success – we know this because it is the duty of any criminal lawyer to provide such advice. In this respect a number (not many) of Applicants have sought as one outcome of the Mediation Scheme, a requirement that POL assist them in overturning their appeal (see *e.g.* M095, Stanley FELL: “Assistance from Post Office to overturn his conviction...and to have his criminal record expunged.”)
17. Given that no Applicant has thus far sought to obtain permission to appeal from the Court of Appeal, it may properly be inferred that none will do so save in the event that some new circumstances arises which alters the position. The request by some Applicants that POL assists in that process is an example of where, if POL were to accede to such a request, such a change could result in an appeal.
18. Of more concern in the context of appeals launched off the back of the Mediation Scheme, is the potential for inadvertently placing a different gloss or interpretation on facts, or otherwise saying anything which may be said to be inconsistent with the way in which the case was originally prosecuted. There, the risk to POL is substantial – a concession for instance that a Horizon shortage was or may have been the result of human error, could fatally undermine the original basis for the prosecution and conviction. Such a concession might well lead to an appeal.
19. Thus in the context of the risk of mediating a case if the SPMR has a caution or conviction, the risk to POL is twofold:
 - i. Whilst no SPMR or clerk convicted of an offence prosecuted by POL has sought to lodge an appeal with the Court of Appeal thus far, in mediating a case if the SPMR has, off the back of the Scheme, already appealed and lost, a SPMR may receive material upon which he might base a further appeal;

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- ii. An Applicant SPMR who has not sought to appeal against his conviction may nevertheless do so in circumstances where he receives material upon which he could found proper grounds of appeal.
20. We judge the risk to POL of the former as being minimal, if not non-existent. We judge the risk to POL of the latter occurring as being substantial, and only mitigated by a very careful consideration of POL Mediation Responses prior to publication to the Working Group or the Applicant.
21. Within the scope of this heading, we also suggest that the very acceptance of a cautioned or convicted Applicant into the Mediation Scheme raises the risk that he may seek to appeal. This is because an Applicant, and potentially the Court of Appeal, might view acceptance into the Scheme as a concession that POL may have erred in prosecuting the Applicant originally.

‘A Line in the Sand’

22. It has always been our view, expressed as far back as September 2013 in conference with Brian Altman QC and echoed by him, that no Applicant who is, in law, guilty of a criminal offence committed against POL, should be allowed into the Mediation Scheme, for the reasons stated then and repeated here. Accordingly we would draw the ‘Line’ at excluding all those with a Caution (Coates - M076) or conviction whether obtained by guilty plea or conviction by jury following a trial (Banks – M057).

Speaking Notes

23. Please refer to Annex 1.

Simon Clarke
Senior counsel
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9th July 2014

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ANNEX 1

Speaking Notes

24. Cautions, Guilty Pleas and Guilty Verdicts:

- i. A **CAUTION** is a non-court criminal disposal
 - can only be administered where there is:
 - Evidence of the commission of an offence; and
 - A full and reliable admission to the complete offence; and
 - An acceptance by the offender of the caution.
 - is recorded on a person's Criminal Record.
- ii. A **GUILTY PLEA** is a formal admission of guilt to the court:
 - Is a conviction by the court;
 - May be qualified by a Basis of Plea;
 - Attracts a lesser sentence;
 - is recorded on a person's Criminal Record.
- iii. A **GUILTY VERDICT FOLLOWING TRIAL** is a formal finding of guilt by a jury:
 - Attracts a higher sentence than does a guilty plea;
 - Is a conviction imposed by the court;
 - is recorded on a person's Criminal Record.
- iv. In terms of criminal offences,
 - A **Caution** represents the admission to having committed a criminal offence;
 - A **Guilty Plea** represents the admission to having committed a criminal offence;
 - A **Guilty Verdict** represents a finding by the court of the defendant having committed a criminal offence.

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25. Appeal rights exhausted” and Risk Impact to POL.

- i. There is a substantial risk to POL that a convicted or cautioned SPMR, admitted to the Mediation Scheme, might obtain sufficient material upon which to base an appeal, unless POL responses thereto are very carefully monitored.
- ii. There is in our view also a lesser, but nevertheless real, risk that a cautioned or convicted Applicant might regard acceptance into the Scheme as a concession by POL that there may be some foundation to their complaint.
