



Ministry of  
**JUSTICE**

# **Draft Code of Practice for Adult Conditional Cautions**

## Government Response

Response to Consultation CP(R)10/2013

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**JUSTICE**

## **Draft Code of Practice for Adult Conditional Cautions**

Government Response

**Response to consultation carried out by the Ministry of Justice.**

**This information is also available on the Ministry of Justice website:  
[www.justice.gov.uk](http://www.justice.gov.uk)**

## **About this consultation**

- To:** This consultation was aimed at criminal justice practitioners in England and Wales, particularly those in the Police Service and the Crown Prosecution Service, magistrates, defence practitioners, victims and offenders.
- Duration:** From 04/10/12 – 01/11/12
- Enquiries to:** Conditional Cautions  
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## Introduction and contact details

This document is the post-consultation report for the consultation paper, Draft Code of Practice for Adult Conditional Cautions.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Michelle English** at the address below:

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This report is also available on the Ministry's website: [www.justice.gov.uk](http://www.justice.gov.uk).

## Background

1. The consultation paper Draft Code of Practice for Adult Conditional Cautions was published on 4<sup>th</sup> October. It invited comments on the new adult Code of Practice for Conditional Cautions which was drafted to:
  - a. support the changes to the provisions on conditional cautions in Part 3 of the Criminal Justice Act 2003 following amendments made by the Legal Aid, Sentencing and Punishment of Offender Act 2012; and
  - b. clarify certain elements in the current Code of Practice.
2. The consultation paper was distributed to a wide range of criminal justice practitioners and key stakeholders. It was also made available on the Ministry of Justice website. A consultation took place concurrently on the Code of Practice on Youth Conditional Cautions.
3. The consultation period closed on 1<sup>st</sup> November 2012 and this report summarises the responses, including how the consultation process influenced the final shape of the Code of Practice consulted upon.
4. Part 3 of the Criminal Justice Act 2003 ('the 2003 Act') makes provision for conditional cautions as a means of dealing with adult offenders in certain circumstances, as an alternative to prosecution. Section 25 of the 2003 Act requires the Secretary of State to prepare a Code of Practice in relation to conditional cautions. The Secretary of State must also publish the draft and consider any representations made about the draft.
5. The policy behind the Code of Practice for Conditional Cautions has previously been consulted on in the Government's Green Paper: 'Breaking the Cycle: effective punishment, rehabilitation and sentencing of offenders' (published on 7<sup>th</sup> December 2010 together with the supporting Impact Assessment and Equality Impact Assessment).
6. The changes to the 2003 Act have also been subject to Parliamentary scrutiny as part of the passage through Parliament of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 "the 2012 Act".
7. In addition to the Code, guidance is issued by the Director of Public Prosecutions under section 37A of the Police and Criminal Evidence Act 1984. The guidance is for police and crown prosecutors on the operational approach to be taken in deciding whether to offer a conditional caution with appropriate conditions. This guidance identifies any aspects which may render a case unsuitable for a conditional caution for example circumstances which may make charging the offender the appropriate response. The guidance will be revised to support the new Code of Practice.

8. An Impact Assessment and Equality Impact Assessment was not published with the Code of Practice as these had previously been prepared for the consultation on the Government's Green Paper: 'Breaking the Cycle: effective punishment, rehabilitation and sentencing of offenders' (published on 7<sup>th</sup> December 2010). The consultation on the draft Code of Practice did ask whether any of the protected characteristics within the Equality Act 2010 are affected by the way in which the Code is drafted and a summary of responses are provided below.

A list of respondents is at Annex A.



## Summary of responses

9. A total of 37 responses to the consultation paper on the adult Code of Practice were received. Of these, approximately half were from the police service. Four responses were received from United Kingdom Border Agency (UKBA) staff, five responses from defence practitioners or their representative bodies, including immigration practitioners, and six responses were received from magistrates. Generally the responses were positive, commenting that the Code gives greater clarification on using conditional cautions appropriately and was a comprehensive reference for decision makers. In responding to what should change, many responses requested more explicit detail on a particular aspect of the process. A break down of responses to the individual questions is set out below.
10. Some responses commented on the policy of conditional cautioning in general which was outside the scope of the consultation. These responses focused on opposition to the police being able to offer conditional cautions without the requirement to refer to the CPS for authorisation in every case, when the CPS should always authorise the decision and the types of offences conditional cautions should be available for. In relation to the foreign offender conditions, some respondents commented that free legal advice should be available for the offender's immigration status as well as on the criminal offence committed.

## Responses to specific questions

**11. Question One: Are you satisfied that the draft Code of Practice for Adult Conditional Cautions (Annex A) fully supports the amendments made by the Legal Aid, Sentencing and Punishment of Offender Act 2012 to Part 3 of the Criminal Justice Act 2003? These amendments are explained at paragraph 19 and 20 of this consultation.**

12. 25 (68%) of respondents answered yes to this question. 11 (30%) did not respond specifically to this question. Only one respondent answered no to this question, commenting that it was not appropriate for police to have the power to offer conditional cautions. Generally however, comments were positive stating that the guidance was clear and the changes made by the 2012 were welcomed by respondents.

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**13. Question Two: Are you satisfied that the draft Code of Practice for Adult Conditional Cautions adequately clarifies certain provisions in the existing Code of Practice? These provisions are explained at paragraph 21 of this consultation.**

14. 22 (59%) of respondents answered yes to this question. 14 (38%) did not respond specifically to this question. Two respondents answered no to this question. Generally the comments were positive with some specific suggestions of where wording could be changed in some places to give greater clarification. These are set out below in response to question three.

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**15. Question Three: If not, what changes do you think should be made?**

16. Comments were generally positive. Changes suggested by respondents were focused on wanting more explicit detail on particular issues. The Government response to the consultation responses and amendments to the Code of Practice is set out at paragraph 34.

### **The amendments made by the 2012 Act**

#### *Police powers to authorise conditional cautions*

17. Some respondents suggested there should be more guidance on what offences conditional cautions are available for and when the decision to offer a conditional caution must be made by the CPS. Others commented that it should be made clearer which bodies are able to vary the conditions after the conditional caution has been administered.

18. There was some criticism of the policy to give the police power to authorise conditional cautions without the involvement of the CPS. There were also comments that magistrates should be consulted as part of the decision making process to offer a conditional caution and that local areas should set up a review panel to oversee the use of conditional cautions and ensure the Code of Practice is being complied with by the police and have the ability to refer “out of line” cases back to the police for training. Respondents who made this suggestion stated that magistrates should have a major role in these panels.

*Foreign offender conditions*

19. Several respondents commented that the places where a foreign offender could be required to report as part of the conditions did not accurately reflect appropriate places. Others commented that the requirement to comply with any lawful instruction from the Secretary of State or an immigration officer was too wide and what this means should be clarified. Another respondent commented that there should be more guidance on offering other types of conditions (reparative, rehabilitative or punitive) alongside the foreign offender conditions.
20. Some respondents questioned the guidance on who was eligible for these conditions. Some respondents commented that they should not be given to an offender who claimed to be aged under 18 but his or her age was disputed by UKBA (a ‘disputed minor’). Another respondent commented that the blanket prohibition at paragraph 2.20 preventing the conditions being offered to those who make an asylum or human rights claim to remain in the UK, was too wide and unnecessarily excluded those who no longer had an outstanding claim, for example where that claim was withdrawn or determined.
21. Some respondents referred to the need to make sure there are sufficiently robust processes in place to identify victims of human trafficking and ensure they are not conditionally cautioned, particularly as they may not always identify themselves as victims to the police.
22. A few respondents commented that the time limits to complete the foreign offender conditions set out at paragraph 2.30 should not be different to the other types of conditional caution and that there was no justification for these being different. Others commented that the period the foreign offender could be excluded from the UK should not be longer than that set out in the Immigration Rules.
23. A theme to the responses on the foreign offender conditions was the immigration status of the offender. Some commented that paragraph 3.6 which sets out what the police must explain to the offender of the effect of the conditional caution, should include a requirement to explain the consequences of the conditional caution on the foreign offender’s immigration status. Others commented that it is not appropriate for the police to make decisions about a foreign offender’s immigration status.

24. There were some comments regarding a foreign offender's non compliance with the conditions. Some commented that it was not appropriate to prosecute a foreign offender who did not comply with the conditions due to a subsequent asylum or human rights claim. Others commented that the Code should be clear that foreign offenders can withdraw from conditions as well as not comply with them.
25. Some respondents stated that only the CPS should be authorised to offer FNOs conditions, the police should not have the power to do so.
26. Others commented that the form the offender is required to sign as setting out conditions and the implications of accepting a conditional caution should be translated into a language the foreign offender can understand.
27. Some respondents commented on the provision of legal advice on the immigration matter. Some commented that the foreign offender should receive legal aid for the immigration advice as well as the criminal matter. It was also commented that the Code should be clear that before administering the conditional caution the police should ensure that the foreign offender has had the opportunity to receive legal advice on the immigration matter as well as the criminal matter.

*Clarification of existing provisions*

28. Some respondents queried whether it would be possible to combine the adult and youth Code of Practice into one Code of Practice covering all offenders.
29. Several respondents commented that it was not helpful that text setting out what the five requirements that must be met before a conditional caution may be given had been removed and that these should be put back into the Code.
30. There were some comments that the language of the Code should be firmer and that many of the references to something that *should* be done would be better expressed as *must* be done. For example, it was suggested that where there was no reasonable excuse for non compliance the offender must be prosecuted, that a financial penalty condition *must* only be used where there are no suitable rehabilitative or reparative conditions and that decision makers *must* take certain things into account.
31. In relation to offering a conditional caution to offenders with a previous criminal history at paragraph 2.11 some respondents commented that more explanation should be given of what a "sufficient lapse of time" would entail.
32. Several respondents commented on the additional guidance on dealing with mentally vulnerable offenders commenting that this was welcomed; however, the Code should make explicit reference to identifying and dealing with such offenders.

33. A theme to responses was the guidance on the implications of the conditional caution. Respondents commented that this was clear and helpful, however others suggested that there should be more detail on what the implications are, including notification requirements following a conditional caution for an offence under the Sexual Offences Act 2003, and that it should be made clear to an offender that the failure to comply with the conditions can be used against him or her in court.

### **Government response**

34. The Government is grateful to all those who responded to this consultation exercise. The response were all given careful consideration and the Government has considered what amendments need to be made to the Code in light of the comments made, particularly with a view to clarifying guidance.
35. Responses regarding the policy of conditional cautions and the changes made to conditional caution legislation by the 2012 Act, were beyond the remit of this consultation. For example, the creation of panels that includes Magistrates to oversee the use of conditional cautions referred to in paragraph 18 above is outside the scope of the Code of Practice. The Government does recognise the value of such panels, however, this piece of work is being taken forward separately as highlighted in the recent White Paper: *Swift and Sure Justice*.
36. The comments set out at paragraph 21 in relation to identifying victims of trafficking is also outside the scope of the Code of Practice. The Government agrees that this is an important consideration, however, there are existing processes in place to address this which focus on the criminal justice system more widely rather than a particular issue for conditional cautions. There are however, sufficient safeguards with conditional cautions to protect such people. If an individual claims to be a victim of trafficking, or it becomes apparent that an individual is such a victim after the conditional caution has been administered, there is provision to withdraw the conditional caution and consider how best to proceed with the matter.
37. The responses set out at paragraph 25 and 27 are also considered to be outside the scope of this consultation. The power for the police to offer conditional cautions without authorisation from the CPS is now set out in primary legislation following the amendments made by 2012 Act. In relation to paragraph 26, there is no requirement to provide a translated copy of the form to the foreign offender. The Government considers that the Code of Practice provides sufficient safeguards by making clear that the police should ensure that the foreign offender has the conditions and implications of the conditional caution explained to him or her in a language he or she can understand prior to accepting the caution and conditions and signing the form.

*Police powers to authorise conditional cautions*

38. The Government agrees that it is important to have guidance on the offences conditional cautions are available for and when the decision to offer a conditional caution must be made by the CPS. This will be set out in the Director of Public Prosecutions (DPP) guidance on Adult Conditional Cautions issued under section 37A of the Police and Criminal Evidence Act 1984. It is possible for other relevant prosecutors to produce guidance if they wish.
39. Some responses stated that it should be made clearer which bodies are able to vary the conditions after the conditional caution has been administered. This has been made clearer by amending paragraph 3.23 of the draft Code to clarify that only a relevant prosecutor or authorised person can vary the conditions.

*Foreign offender conditions*

40. Paragraph 2.18 of the draft Code which gives details of the foreign offender conditions has been amended to clarify where an offender can be required to report to as part of the conditions, and that the lawful instruction given by a Secretary of State or an Immigration Officer are to effect a person's removal from the United Kingdom.
41. One response commented that there should be guidance on the use of other types of conditions alongside the foreign offender conditions. The Code of Practice is clear that the foreign offender conditions should take priority when considering a conditional caution for a foreign offender. Any additional guidance on the operational use of other types of conditions will be set out in the DPP guidance on Adult Conditional Cautions.
42. In relation to the responses on eligibility of the foreign offender, it is not considered necessary to specifically exclude disputed minors from the foreign offender conditions. The Government considers there are sufficient safeguards in dealing with such offenders as the conditions cannot be imposed on a foreign offender; the foreign offender must consent to the conditions to depart from the UK and not return for a period.
43. The blanket exclusion to offer a conditional caution with foreign offender conditions to foreign offenders who make an asylum or human rights claim to remain in the UK has been amended. The Government is clear that no-one will be removed from the UK where it would be in breach of our international obligations and conditional cautions will not be used to remove foreign offenders whose asylum or human rights claim is ongoing. However, where for example that claim has been voluntarily withdrawn by the offender, or has been revoked, or refused and all appeals against that refusal finally determined, then consideration may be given to whether the foreign offender conditions may be appropriate. Paragraph 2.20 of the Code has been amended to reflect this. As with all types of conditional cautions, the conditions cannot be imposed on the foreign offender. The offender must still admit to the offence and consent to the conditional caution, including the condition to depart from the UK.

44. Some respondents commented on the time limits within which the conditions should be completed and the ability to set a condition excluding a foreign offender from the UK for a longer period than which will be set out in the Immigration Rules. The Government considers that there is a justification for a longer time limit to complete the conditions due to, for example, the need to obtain a travel document from a foreign government. The Government also considers that the new provisions in the 2003 Act enables the exclusion period to be set for a period longer than the Immigration Rules if required. Therefore no further changes have been made to the Code of Practice.
45. There were some comments regarding the effect to the foreign offenders immigration status; that paragraph 3.6 of the Code should be amended to make clear the police should explain the effect of the conditional caution on the immigration status and also that the police should not make a decision based on the immigration status of the offender. In addition, several respondents commented on the provision of immigration advice for the foreign offender in addition to criminal legal advice.
46. In response, paragraph 2.51 of the Code has been amended to make clear that the decision maker (usually the police or the CPS) must consult with UKBA prior to making the decision to offer the conditional caution and that confirmation of the offender's immigration status should be obtained. In addition, paragraph 3.6 of the Code is clear that the police should explain to the offender the requirements of the conditions and exactly what the offender will be required to do and the Government considers that this is sufficient for the offender to be informed that the condition requires the foreign offender to depart the UK and not return for a period of time. The foreign offender must consent to being given a conditional caution and in doing so the offender is entitled to seek their own legal advice in relation to their immigration status. However, as noted in the Code, in relation to civil legal aid, the offender is not entitled to free and independent legal advice in relation to most non-asylum immigration matters (such as their immigration status).
47. With regard to responses relating to non compliance of the conditions, paragraph 3.21 of the Code has been amended to make it clear that a foreign offender can choose to withdraw from the conditional caution as well as be considered to not comply.
48. Some respondents commented that a foreign offender should not be prosecuted where they do not comply with the condition to depart from the UK due to making an asylum or human rights claim after the conditional caution had been administered. The Government considers that this is a comment on the policy of the foreign offender conditions and this is outside the scope of the consultation. However, the Government considers that there are sufficient safeguards within the conditional caution scheme for dealing with such a scenario; in every case where conditions are not complied with the offender should be given an opportunity to explain his or her reasons for the non compliance. Decisions makers will then decide whether there is a reasonable excuse for the non compliance, and whether

the offender should be prosecuted. This is set out clearly in the Code of Practice and is considered to be sufficient safeguards.

*Clarification of existing provisions*

49. In relation to combining the adult and youth Code of Practice into one Code of Practice this is not currently possible. The two Codes of Practice cover different processes within the conditional caution scheme, for examples the adult scheme deals with foreign offender conditions which are not available for youths, while the youth scheme requires involvement of youth offending teams which the adult scheme does not. The two Codes of Practice are also brought into effect through different Parliamentary processes.
50. The Government agrees that the inclusion of the five requirements that must be met before a conditional caution may be given should be included within the Code and this has been done at paragraph 2.1 of the Code.
51. In relation to altering the language of the Code to change certain aspects to “must” rather than “should”, this is not always appropriate. For example, where there was no reasonable excuse for non compliance a prosecution may follow, and in most cases should but it must still be considered in every case whether a prosecution is in the public interest and so it must not always follow.
52. Some respondents commented that the Code should give a greater explanation of what “a sufficient lapse of time” means in relation to offering a conditional caution to offenders with a previous criminal history. The Government considers that this will depend on the circumstances of each case and that police and prosecutors should be able to use their own professional judgement on how this applies to the case before them and therefore explicit guidance would not be appropriate.
53. In relation to comments that the Code should make explicit reference to identifying and dealing with mentally vulnerable offenders, the Government considers that this would not be appropriate. Police officers already have existing guidance on identifying and dealing with such offenders and the Code signposts this guidance. This existing and well established guidance should be followed rather than creating separate guidance for conditional cautions.
54. In relation to comments regarding guidance on the implications of the conditional caution set out at paragraph 33, the Government considers that the existing guidance is comprehensive and makes clear what should be explained to an offender. It is not considered necessary to set out in more detail the notification requirements following a conditional caution for an offence under the Sexual Offences Act 2003 as this is provided in separate guidance.



**55. Question 4: What do you consider the equality issues arising from the way the Code has been drafted to be, and why? Please list any sources of evidence to support your response.**

56. Most respondents did not comment on this question or merely stated that there were none. Some comments were received on three equality issues.

*Mentally vulnerable offenders*

57. Comments were generally positive stating that respondents were pleased to see the Code include provision on mental vulnerability. In responding to the consultation, Mencap agreed that conditional cautions are useful and should be available to those with a mental vulnerability but it was important that such offenders have the additional support they need. Some respondents wanted more guidance on dealing with such offenders. The Government considers this would not be appropriate for the reasons set out above at paragraph 53.

*Female Offenders*

58. One respondent commented that there may be a need to deal with women differently. The Government considers that it is not necessary to have within the Code a specific section on women offenders. The Code does already make clear that when selecting appropriate conditions the decision maker should consider the circumstances of the offender. We consider that this is adequate.

*Foreign Offender Conditions*

59. There were some comments, mainly from Immigration Legal Practitioners that there may be an issue of race and nationality with regard to foreign offenders being removed from UK following a conditional caution. The government is satisfied that it is right to offer conditional cautions for those foreign offenders with no leave to enter or remain in the UK, who admit to committing a criminal offence, agree to accept a conditional caution with the conditions to depart and not return, and where it is not in the public interest to prosecute. We are satisfied that the use of conditional cautions in this manner is fully justified and designed to help the Secretary of State best manage use of the prison estate and expedite the removal from the UK of those who have no right to be here.

60. Eligibility for the conditions effecting departure from and preventing return to the UK is not based on nationality or ethnicity or any protected characteristic of the offender. Rather it is based entirely on immigration status; only offenders who have no legal permission to enter or remain in the UK are eligible for these conditions.

61. UKBA are already required to removal foreign offenders who have no legal basis of stay in the UK. This is usually done during or at the end of a prison sentence so these conditions bring forward the removal and do not have an affect on the offender's right to be in the UK.

## **Conclusion and next steps**

62. Several changes have been made to the Code, as described above, as a result of the consultation process. The amendments have been agreed by the Attorney General as required by section 25 of the Criminal Justice Act 2003.
63. It is proposed to bring the new Code into effect in 2013 alongside the amendments to the 2003 Act made by the 2012 Act.
64. Separately new Director's Guidance on Adult Conditional Cautions will be issued by the Director of Public Prosecutions under section 37A of the Police and Criminal Evidence Act 1984 at the same time.

## **Consultation Co-ordinator contact details**

If you have any comments about the way this consultation was conducted you should contact Sheila Morson on 020 3334 4498, or email her at: [sheila.morson@justice.gsi.gov.uk](mailto:sheila.morson@justice.gsi.gov.uk).

Alternatively, you may wish to write to the address below:

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## The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

**These criteria must be reproduced within all consultation documents.**

## Annex A – List of respondents

Type of respondent	Number of responses
Police Forces/Association of Chief Police Officers (ACPO)	14
Crown Prosecution Service	2
Defence Practitioners/their representative bodies	5
Magistrates	6
United Kingdom Border Agency (UKBA)	4
Third Sector	2
Probation	1
Other	3

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