EXPLANATORY MEMORANDUM TO

THE CRIMINAL JUSTICE ACT 2003 (CONDITIONAL CAUTIONS: CODE OF PRACTICE) ORDER 2010

2010 No. 133

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The instrument introduces a revised Code of Practice for Conditional Cautions. This can be downloaded from the Official Documents website (at http://www.official-documents.gov.uk/menu/other2009.htm). The Code provides guidance on the use of conditional cautions for adults under Part 3 of the Criminal Justice Act 2003 (as amended by the Police and Justice Act 2006 and the Criminal Justice and Immigration Act 2008). Once in force, the revised Code will replace the current Code (available at http://www.homeoffice.gov.uk/documents/cond-caution-cop?view=Binary), which was introduced by SI 2004/1683: Criminal Justice Act 2003 (Conditional Cautions: Code of Practice) Order 2004.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Part 3 (sections 22 to 27) of the Criminal Justice Act 2003 ("the 2003 Act") makes provision for conditional cautions (cautions to which specified conditions are attached) as a means of dealing with adult offenders in certain circumstances as an alternative to prosecution. Sections 17 and 18 of the Police and Justice Act 2006 amended Part 3 of the 2003 Act to expand the scope of the conditional caution scheme. Section 17 has been implemented shortly before the introduction of the revised Code to the extent of inserting new sections 22(3), (3A)(a), 23A, and 330(5)(aa) into the 2003 Act, which provide that a conditional caution may contain conditions which have the object of punishing the offender by the imposition of a financial penalty. Section 18, by inserting a new section 24A, provides the police with powers of arrest and detention if an offender is suspected of non-compliance with a conditional caution[1]. Subsequent minor amendments provided for by Schedules 26 and 28 of the Criminal Justice and Immigration Act 2008, also implemented shortly before the introduction of the revised Code, amend section 23A (altering details of how financial penalties should be paid and providing that this information may be set out in guidance) and insert section 23B (providing prosecutors with a specific power to vary conditions).

4.2 The 2003 Act obliges the Secretary of State to prepare a code of practice in relation to conditional cautions and, from time to time, revise any such code of practice. If he intends to do so, the Secretary of State must publish a draft of the revised code of practice, consider representations made to him about the draft, amend the draft

[1] This came into force on 29 June 2007.

accordingly and obtain the consent of the Attorney General to the publication and amendment of the draft. He is then obliged to lay the revised code of practice before each House of Parliament. The 2003 Act also requires that any instrument bringing the revised code into force must be laid before, and approved by a resolution of, each House of Parliament. The existing Code of Practice was introduced, after approval by Parliament, on 3 July 2004.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State, Claire Ward, has made the following statement regarding Human Rights:

> In my view the provisions of The Criminal Justice Act 2003 (Conditional Cautions: Code of Practice) Order 2009 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7.1 The existing Code of Practice has been revised significantly, mainly to reflect the amendments to the conditional caution scheme made by the Police and Justice Act 2006 as outlined above. There have also been a number of structural changes to the document, designed to make the document clearer and easier to understand.

7.2 The main changes cover:

<u>Punitive Conditions (financial penalty condition only)</u>
The existing conditional cautioning scheme (available across England and Wales since March 2008) allows conditions with a rehabilitative or reparative objective. The provisions in the Police and Justice Act 2006 extend the scheme to allow punitive conditions to be attached in the form of a financial penalty. The maximum amount of a financial penalty is limited to £250 or 25% of the fine available on summary conviction in a Magistrates' Court, whichever is the lower. The offences for which a financial penalty is available must be set out in an order approved by Parliament.

Although the Code will be implemented throughout England and Wales, the provisions in the Police and Justice Act 2006 allowing for financial penalties to be attached to a conditional caution will only be implemented in specified pilot areas.

<u>Powers of Arrest and Detention</u>
The Police and Justice Act also provides the police with a specific power to arrest and detain offenders suspected of non-compliance with the conditions of a conditional caution without reasonable excuse. These provisions came into force on 29 June 2007.

<u>Admissions</u>
The existing Code of Practice contains a requirement for an admission in a cautioned interview under the Police and Criminal Evidence Act 1984 (PACE) before a conditional

caution can be considered. This requirement was denying some suspects an opportunity of receiving a conditional caution, for example in cases where there is enough evidence to charge (and therefore where the PACE Code precludes the police from interviewing), Accordingly, it has been removed in the revised Code. The admission of the offence by the offender remains one of the five statutory requirements which must be satisfied before a conditional caution may be given.

Additional Safeguards

Additional safeguards are included in the revised Code to ensure that conditional cautions are used appropriately, specifically:

- a requirement for prosecutors to publish guidance on the approach to be taken in deciding whether a conditional caution is an appropriate response to the offending behaviour (see Section 3 of the revised Code);
- a requirement that, when determining the conditions to be attached to a conditional caution, prosecutors take into consideration the likely outcome if the case had proceeded to court (see paragraph 5.3 (last bullet point) of the revised Code);
- guidance that, where the suspect denies the offence or raises a defence, it is not appropriate to make an offer of a conditional caution (see paragraph 5.5 of the revised Code);
- guidance that the primary focus of the conditional caution scheme is problem-solving, that is providing redress for victims and/or helping offenders deal with problems that may lead to offending behaviour; and that the financial penalty condition should not be used when there are more appropriate conditions (see paragraph 7.2 of the revised Code);
- Paragraph 11.3 of the revised Code requires the implications of accepting a conditional caution to be explained to the offender at the time of offering the Conditional Caution including the requirement that the authorised person explains that the offender may decide at any stage to withdraw from the conditional caution, but it that he does he may be charged with the original offence

- ***Consolidation***

7.3 Not applicable.

8. Consultation outcome

8.1 The draft Code was, with the agreement of the Attorney-General, issued for consultation on 6 March 2007 and comments were invited by Tuesday 29 May 2007. The consultation was conducted in line with the Cabinet Office Code of Practice on written consultation. A total of 42 responses were received and were taken into account accordingly.

8.2 Ten respondents indicated that they were satisfied that the revised Code of Practice met the needs of the criminal justice system, victims and offenders within the terms of the legislation. Twelve respondents expressed reservations about the principles of the conditional cautioning scheme or made general comments on conditional cautioning and twenty-four respondents raised points of detail on the Code.

8.3 Following the consultation exercise a number of detailed amendments have been made to clarify aims, remove ambiguity, improve the layout and wording of the document; and, where appropriate, ensure consistency with the Code of Practice for the Youth Conditional Caution. Key changes include:

- Making it clear that conditional cautions should be used as a response to **low-level** offending and prosecutors should take account of the **seriousness** of the offence;
- Making it clear that where an offender denies the offence or raises a defence a conditional caution should not be offered;
- Some amendments to section 6 to emphasise that all conditions set should avoid conflict with the offender's religious beliefs and any interference with the times at which he normally works or attends an educational establishment;
- The proposed right to revoke a conditional caution within a specified time has been removed following concerns that this requirement would significantly increase bureaucracy and could be misleading. The conditional caution is voluntary and the offender can decide at any stage to revoke their consent to the caution and then may go to court. Revised text provides that the offender must be informed of his right to retract the conditional caution and the consequences of invoking that right; and
- In addition the ability to attach punitive unpaid work as a condition of a caution has been removed from the Code because of concerns that the costs of punitive unpaid work will significantly outweigh the benefits for the adult conditional caution.

8.4 Go to: http://www.cjsonline.gov.uk/downloads/application/pdf/2nd%20Code%20of%20Practice%20on%20conditional%20cautions.pdf for the consultation paper and http://www.cjsonline.gov.uk/downloads/application/pdf/Response%20to%20consultation%20Dec_07.pdf to see the Government's response.

9. Guidance

9.1 The Code of Practice governs the operation of all conditional cautioning schemes for adult offenders. Further detailed guidance relating to the Crown Prosecution Service is set out in the Director's guidance on the conditional caution. This is available on the CPS website (http://www.cps.gov.uk/publications/directors_guidance/conditional_cautioning.html). Updated guidance will be published at the same time that the revised Code of Practice comes into force.

10. Impact

10.1 The impact on business, charities or voluntary bodies is expected to be negligible.

10.2 The impact on the public sector is expected to be negligible.

10.3 An Impact Assessment has not been prepared for this instrument. It is intended to consider impact as part of a review of the pilot prior to any national roll-out.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 It is intended to evaluate the pilot prior to any national roll-out.

13. Contact

Louisa Carrad at the Office for Criminal Justice Reform (Tel: 07775 816 972 or e-mail: Louisa.carrad@cjs.gsi.gov.uk or Conditional-cautions@cjs.gsi.gov.uk) can answer any queries regarding the instrument.