**EXPLANATORY MEMORANDUM TO**

**THE CRIMINAL JUSTICE ACT 2003**
**(CONDITIONAL CAUTIONS: FINANCIAL PENALTIES) ORDER 2009**

**2009 No. 2773**

**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 Criminal Justice Act 2003 (Conditional Cautions: Code of Practice) Order 2009 ("the Order") allows financial penalties to be attached to a conditional caution. The Order sets out the offences for which a financial penalty can be attached to a conditional caution. It also sets out the maximum level of the financial penalty for each offence or each description of offence.

## 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. Section 17 of the Police and Justice Act 2006 amends Part 3 of the 2003 Act, and has inserted 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. Subsequent minor amendments provided for by Schedules 26 and 28 of the Criminal Justice and Immigration Act 2008, amend section 23A by altering details of how financial penalties should be paid and provide that this information may be set out in the code of practice for conditional cautions.

4.2 Under section 23A(2) the offences for which a financial penalty can be attached to a conditional caution must be set out in an order. That order must also prescribe the maximum level of penalty for each offence or group of offences, subject to an overall maximum level of penalty specified in section 23A(3).

4.3 This is the first use of the power.

## 5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

## 6. European Convention on Human Rights

As the instrument is subject to negative resolution and does not amend primary legislation, no statement is required.

## 7. Policy background

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

7.1 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 one quarter of the fine available on summary conviction in a Magistrates' Court, whichever is the lower. In order to address concerns expressed during the passage of the Bill, an amendment was made to provide that the offences for which a financial penalty is available must be set out in an order approved by Parliament.

7.2 The financial penalty condition for the adult conditional caution will be piloted in a number of areas from November 2009 before a decision on national implementation is made. A Revised Code of Practice has also been produced and is currently before Parliament[1]. Although the Code will apply 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 five specified pilot areas.

7.3 A financial penalty can be made a condition of a caution for most of the offences for which a conditional caution can be administered[2], except for drug and prostitution offences, where the key aim is rehabilitation. The proposed levels of the financial penalties are lower than the maximum provided for in legislation, ranging from £50 to £150 (depending on the offence). Additional guidance will provide that the level of financial penalty set out in the order should generally apply (ie this is the 'standard' penalty). However, Crown Prosecutors will have limited discretion to attach a 'mitigated' penalty of between £40 and £100 (depending on the offence). This will be possible where the prosecutor is satisfied that there is substantial mitigation for the commission of the offence or the offender is in receipt of state benefit (such as income support or job seeker's allowance) as their main or only source of income. This is in line with a commitment made by the Government.

- ***Consolidation***

7.3 Not applicable.

## 8. Consultation outcome

[1] Go to http://www.official-documents.gov.uk/document/other/9789999098144/9789999098144.asp to access the Revised Code of Practice

[2] The offences for which a Crown Prosecutor can offer a conditional caution are set out in the Director's Guidance (http://www.cps.gov.uk/Publications/directors_guidance/conditional_cautioning.html). They are most summary only offences and a limited number of either way offences including criminal damage, some theft act offences and possession of any class of drugs consistent with personal use.

8.1 A draft financial penalty order was included in the consultation paper issued on the draft Code of Practice for conditional cautioning which was, with the agreement of the Attorney-General, issued for consultation on 6 March 2007. The deadline for comments was Tuesday 29 May 2007. The consultation was conducted in line with the Cabinet Office Code of Practice on written consultation. Only one of the 42 respondents commented on the financial penalty order - expressing a concern that the offence list was drawn too widely.

## 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 of Public Prosecution's Guidance on Conditional Cautioning. The current (5th edition) is available on the CPS website (see footnote 2 for web address). Updated guidance will be published in November to coincide with the start of the pilots. This will cover the use of the financial penalty order.

## 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 implementation.

## 11. Regulating small business

11.1 The legislation does not apply to small business.

## 12. Monitoring & review

12.1 It is intended to review the pilot prior to any national implementation of the financial penalty condition.

## 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.